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In the Supreme Court of the United States

October Term, 1969

No. 728

IRA CLEMENS (Individually and on Behalf of Others Adversely Affected),
Petitioner

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, LEHIGH AND NEW ENGLAND RAILWAY COMPANY AND LEHIGH AND NEW ENGLAND RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1968

Ira Clemens (individually and on behalf of others adversely affected), Petitioner

vs.

Central Railroad Company of New Jersey, Lehigh and New England Railway Company and Lehigh and New England Railroad Company

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners ask for a Writ of Certiorari to review the judgment of the Court of Appeals for the Third Circuit entered in this case on August 9, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, infra, pp. 24-30) is not yet reported. The opinion of the District Court (Appendix B, infra, pp. 31-73) is reported at 264 F. Supp. 551. The opinion of the Court of Appeals in the companion case *Roberts v. Lehigh and New England Ry.* (Appendix C, infra, pp. 74-81) is reported at 323 F. 2d 219 and the District Court's opinion in the companion case *Roberts v. Lehigh and New England Ry.* (Appendix D, infra, pp. 82-88) is reported at 211 F. Supp. 379.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was entered on August 9, 1968. The order denying rehearing, entered on October 4, 1968 is reproduced as Appendix E, infra, p. 89. The Jurisdiction of This Court is invoked under 28 USC §1254 (1).

QUESTIONS PRESENTED

1. Are not the provisions of the Railway Labor Act (45 USC 151 et seq.) suspended by virtue of the plenary powers granted to the Interstate Commerce Commission by 49 USC 5 (11)?

2. Where two carriers consolidate under 49 USC 5 (2) and workers who lose employment without severance compensation as provided by 5 (2) (f) of the Interstate Commerce Act file a class-action-Complaint charging a violation of the Railway Labor Act, 45 USC 151, and the District Court rules on Motions to Dismiss under FRCP 12 (b) that the Court has no jurisdiction over the dispute, but that primary jurisdiction lies in the National Railroad Adjustment Board; and the workers file a new Complaint, this time charging the railroads with a violation of the Interstate Commerce Act and the Order of the ICC, and the Court, again called upon to rule under FRCP 12 (b) Motions to Dismiss, this time sustains the Complaint and Orders Compulsory Arbitration as mandated by the ICC Order, may the United States Court of Appeals reverse on the grounds of Res Judicata, holding that the workers were bound by the ruling on the first Complaint, thus relegating the workers to relief under the Railway Labor Act, contrary to that Act and contrary to section 5 (11) of the Interstate Commerce Act?

STATUTES INVOLVED

The pertinent sections of the Interstate Commerce Act are printed in Appendix F; while the section of the Railway Labor Act establishing the National Railroad Adjustment Board is printed in Appendix G.

STATEMENT

The Lehigh & New England Railroad[1] in 1960 made application to the Interstate Commerce Commission, pursuant to 49 USC §1 (18-20), Finance Docket No. 21155, for permission to abandon a large part of its trackage and facilities and to sell the balance of its line to a newly formed subsidiary of the Central Railroad of New Jersey, The Lehigh & New England Railway, the other applicant, under 49 USC 5 (2), Finance Docket No. 21154.[2]

At the hearing the carriers agreed to abide by the ICC decision known as the *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952) as a means of protecting workers who would lose their jobs as a result of the abandonment. The Commission approved the abandonment, and, as part of its Order, imposed the "protective labor conditions" of the *New Orleans* case on the applicants on September 26, 1961. 312 I.C.C. 652.

The New Orleans case provides inter alia that any labor dispute involving the abandonment must be resolved by compulsory arbitration, the panel of which is to be selected by both labor and management, whose selectees then elect a neutral as Chairman.

After the abandonment, and issuance of the I.C.C. Order, *Railway* and three railroad brotherhoods entered into a collective bargaining agreement which provided

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[1] Hereinafter referred to as *Railroad*.

[2] Hereinafter called *Railway*.

that workers reaching their 65th birthday would summarily be discharged.

In 1962, workers who reached their 65th birthday and had been discharged, and others nearing that age, banded together and commenced a class action against their unions and the carriers involved. Their complaint filed in the District Court for the Eastern District of Pennsylvania charged their unions and the carriers with the making of an illegal retirement agreement contrary to the Washington Job Protection Agreement of 1936.[3] The Complaint asked for a declaratory judgment, ruling the retirement agreement discriminatory and contrary to the Railway Labor Act; reinstatement and back pay for those already discharged; an injunction to compel the carrier to set aside the agreement; and punitive damages against the unions and railroads equivalent to severance pay, which they would have been entitled to had the unions and carriers not entered into this unlawful collective bargain after I.C.C. approval of the abandonment. *Roberts v. Lehigh & N. E. Railway,* et al., 211 F. Supp. 379. The District Court, on Motions to Dismiss filed by the unions and railroads under FRCP 12 (b), ruled that the District Court had no jurisdiction over the subject matter; that primary jurisdiction over the dispute was in the National Railroad Adjustment Board, a tribunal established under the Railway Labor Act. The displaced workers appealed and the Court of Appeals for the Third Circuit affirmed, 323 F. 2d 219, holding that there was no jurisdiction in the District Court for the subject of the Complaint, but indicating that if the workers accepted their discharge as final

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[3] The forerunner of the *New Orleans* case, and as the legislative history reveals, the basis for 49 U.S.C. §5(2)(f).

they could obtain federal court jurisdiction under the doctrine of *Slocum v. Del. L. & W. R. Co.*, 339 U.S. 239.

Upon receiving this guidance from the Third Circuit, the workers filed the instant complaint, averring many of the *Roberts* allegations, but pointing out that the statute applicable was the Interstate Commerce Act, and the question for decision was whether or not the railroads (the unions were not made parties to this case) had violated the ICC Order, and hence the Interstate Commerce Act. Lastly, the workers, by amendment to the complaint, asked for a mandatory injunction to compel the railroads to arbitrate the dispute as provided in the "protective conditions" of the *New Orleans Case. Clements v. Central Railroad of N. J. et al.*, 264 F. Supp. 551. Again the railroads filed a Motion to Dismiss under FRCP 12 (b), contending that the District Court had no jurisdiction over the subject matter; and moreover the matter should be dismissed for another reason: the ruling in *Roberts* was a bar to this *Clements* suit because of Res Judicata.

The District Court denied the Motion to Dismiss the Complaint under 12 (b), holding that the applicable statute *was* the Interstate Commerce Act; it found the railroads violated that act when it entered into forcible retirement agreements without severance pay, *after* the issuance of the ICC Order approving the abandonment; and it ordered the *Clements* dispute arbitrated as provided by the *New Orleans* "conditions" imposed upon the carriers by the ICC in its approving Order.

The parties proceeded to arbitration before a panel selected by the railroads, but in the meantime the railroads took an appeal from the lower Court's decision to

the Third Circuit Court of Appeals. Arbitration was completed by June of 1968, but the attorneys for the railroads prevailed upon the arbitrators to withhold their award pending the decision of the Third Circuit, which was finally handed down on August 9, 1968. The arbitrators have not issued any award, taking their cue from the railroad lawyers who told them that because the Third Circuit's decision of August 9, 1968 reversed the District Court, any award would be surplusage.

The Third Circuit Court of Appeals ruled that this *Clemens* complaint must be dismissed because it was barred by the doctrine of Res Judicata, i.e., because *Roberts* had ruled that the District Court had no jurisdiction over the subject matter. This opinion printed, infra, p. 24, is still not officially reported. The Third Circuit refused a Rehearing on October 4, 1968.

The petitioners in this case call for the exercise of This Court's supervisory powers by the grant of this Petition for a Writ of Certiorari because the Third Circuit Court of Appeals has totally ignored the decisions of this Court on the question of Res Judicata on Motions to Dismiss a Complaint under FRCP 12 (b); but more important the Third Circuit has ignored decisions of This Court which uphold the plenary power of the I.C.C. as granted by 49 USC §5 (11); and equally important, the Third Circuit Court of Appeals' decision in this case is in clear conflict with the decisions of the Second, Fifth and Eighth Circuit Courts of Appeals which have ruled that the intent of Congress in enacting the Interstate Commerce Act's section 5 (11) and 5 (2) (f), was to give plenary power to the I.C.C. and hence suspend all other laws, including the Railway Labor Act.

The above three Circuit Courts of Appeals have held that agreements and all laws are suspended when a statutory Board or Commission is effectuating the purpose of a Congressional Act in mergers, consolidations or abandonments by carriers. These decisions, detailed below, reveal that once a carrier invokes 49 USC §5 (2), and the Interstate Commerce Commission or a Board takes jurisdiction, the railroads as well as the workers are restricted to the relief afforded by the Interstate Commerce Act and the Order issued by the Interstate Commerce Commission. All laws are suspended other than the Interstate Commerce Act. No other statutory or administrative remedy is available.

The Third Circuit Court of Appeals stands alone in its belief that railroad workers must go to the National Railroad Adjustment Board, a tribunal established under the Railway Labor Act, 45 USC 151 et seq., when they charge their railroad-employer with a violation of the Interstate Commerce Act and an Order issued by the Interstate Commerce Commission.

In these days of ever increasing railroad abandonments, consolidations and mergers, the conflict between the Third Circuit Court of Appeals on the one hand and the Second, Fifth and Eighth Circuits on the other should be definitely resolved by this Court. Railroads as well as railroad workers are entitled to know whether the Railway Labor Act is suspended when a railroad invokes 49 USC §5 (2) to bring about a merger, consolidation or abandonment. The Interstate Commerce Act says just this. The Second, Fifth and Eighth Circuit Courts of Appeals says this too.

Though not ruling squarely on whether the Railway Labor Act or the Interstate Commerce Act applies in a labor dispute stemming from a §5 (2) application, This Court has held that other federal laws are suspended when this section of the Act is invoked to effectuate a carrier merger, consolidation or abandonment. But the Third Circuit Court of Appeals believes the Railway Labor Act is not suspended; on the contrary they take the view that a hearing before a tribunal established by the Railway Labor Act is the remedy available to the instant aggrieved workers, who charge the railroad with a violation of the Interstate Commerce Act.

REASONS FOR GRANTING THE WRIT

I. The Lower Court

Since the railroads filed a Motion to Dismiss under FRCP 12 (b) contending, inter alia, that this suit was barred by the decision in *Roberts,* supra, the lower court reviewed both decisions. 211 F. Supp. 379, affirmed, 3rd Circ. 323 F. 2d 219. The lower court noted that in *Roberts* the workers wanted reinstatement with back pay plus punitive damages; while in the instant case they charged their railroad-employers with a violation of the Interstate Commerce Act; and sought in this case the relief afforded by the Order of the ICC, to wit, compulsory arbitration of the dispute. The lower Court thus held that *Roberts* was properly decided as a Railway Labor matter; but that *Roberts* did not bar *this* action because it is grounded as an Interstate Commerce Act matter; and moreover, the lower court held that since the ICC imposed compulsory arbitration of this dispute as part of the Order approving the abandonment, the court had no alternative but to order the reluctant railroads to arbitrate the matter which was the subject of this Complaint.

Instead of seeing this as an Interstate Commerce Act violation, consonant with the District Court's view, the Third Circuit Court of Appeals took the tack that this matter had been reviewed once before, totally ignoring the important fact that it had only been reviewed in the pleading stage under FRCP 12(b). *Roberts,* supra. Since

Roberts held that a tribunal established under the Railway Labor Act had primary jurisdiction over this dispute, the Third Circuit held this Complaint had to be dismissed on the grounds of Res Judicata.

The Third Circuit Court of Appeals totally missed the distinction between *Roberts* and the present complaint. *Roberts* sought reinstatement with back pay; and a declaration that the unions and the railroads had entered into a collective bargain contrary to the Railway Labor Act; while this suit does not seek reinstatement with back pay —the only relief the National Railroad Adjustment Board could give. This suit seeks compulsory arbitration of this dispute, as provided by the ICC in its Order approving the subject abandonment. And the dispute is whether or not the workers are entitled to severance pay, under the ICC Order. And the National Railroad Adjustment Board cannot take jurisdiction over a matter involving severance pay allegedly due workers as a result of being displaced because of a merger, consolidation or abandonment. But more importantly, since the railroad agreed to accept the terms of the *New Orleans* case, and the ICC imposed the *New Orleans* case on the railroad as a means of protecting the displaced workers, and since the *New Orleans* case directs the parties to compulsory arbitration in the event of a dispute, the Third Circuit's ruling flies in the face of the decision of the Interstate Commerce Commission. This ruling also makes it possible for the Railroads to break the promise they made to the ICC, i.e., that they would abide by the *New Orleans* case as a means of "protecting" displaced workers.

It need hardly be mentioned that the swiftest means of resolving this dispute is compulsory arbitration, se-

lected by the interested parties. The tedious route to the National Railroad Adjustment Board has caused Congress such great concern that in 1966 it amended the Railway Labor Act permitting parties to set up special adjustment boards because of a Congressional finding that grievances before the National Railroad Adjustment Board were being disposed of from five to seven years after being filed. 45 USC 153, Public Law 89, 456; 80 Stat. 208; House Report No. 1114, Oct. 1, 1965; Senate Report No. 1201, June 2, 1966. Cong. Rec. Vol. 112 (1966).

This case has already been fully arbitrated in accordance with the Order of the lower Court. 264 F. Supp. 551, 1967. The Circuit Court has given no clue as to why it relegates the plaintiffs, who have already had their relief of arbitration (albeit no decision), to a waiting period of from five to seven years before a tribunal, which has no jurisdiction, and which must eventually tell them that it has no authority under the Railway Labor Act to award them *severance pay,* in accordance with an ICC Order.

II. The Interstate Commerce Act

This Court has interpreted 49 USC §5 (11) to mean that in approving mergers and consolidations the ICC may ignore the anti-trust laws of Congress so long as a more efficient system to serve the public evolves from the approval of a consolidation or merger. This Court said in *McLean Trucking Co. v. U.S.,* 321 U.S. 67 at p. 78:

> "Hence, it is admitted the Commission with propriety may approve a rail consolidation, otherwise

prohibited by the anti-trust laws, in order to bring about needed or desirable improvement in service and economies in operation."

In *Minneapolis & St. L. R. Co. v. U.S.*, 361 U.S. 173, p. 187, This Court said:

> "As respects railroad acquisitions, the Commission is not so bound by the anti-trust laws that it must permit them to overbear what it finds to be in 'the public interest.' A contrary view would, in effect, permit the Commission to authorize only those acquisitions which would not offend those laws. As has been said, this would render meaningless the exemption relieving the participants in a properly approved (acquisition) of the requirements of those laws."

And in *California v. Federal Power Com.*, 369 U.S. 482, This Court said at p. 485:

> "Under the Interstate Commerce Act, mergers of carriers that are approved have an anti-trust immunity as §5 (11) of that Act specifically provides that the carriers involved 'shall be and they are hereby relieved from the operation of the anti-trust laws.'"

Chief Justice Warren thoroughly reviewed the impact on labor by mergers of railroads in *Brotherhood of M of W vs. U.S.*, 366 U.S. 169, where the specific issue was the meaning of 49 USC §5 (2) (f). But This Court has never ruled squarely on whether or not the provisions of the Railway Labor Act are suspended when a merger, consolidation or abandonment is approved by the ICC. However, in *Brotherhood of Locomotive Eng. v. Chicago*, 314

F. 2d 424 (1963), this issue was raised, and This Court denied certiorari. 375 U.S. 819, 11 L. Ed. (2d) 53, 84 S. Ct. 55. In that case the ICC, in approving a railroad consolidation, imposed "labor protective conditions" similar to the instant case. The union became dissatisfied over certain changes made in seniority rights resulting from the consolidation, and sought relief under the Railway Labor Act, 45 USC 151 et seq. The carriers filed a declaratory judgment action against the union, posing the question whether or not the Railway Labor Act was suspended as a result of a proceeding pursuant to 49 USC 5 (2). In affirming the lower court, which held that the Railway Labor Act was suspended, the *Eighth Circuit* said at 431:

> ". . . Congress intended the ICC to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers. Thus, like the trial court, we come to the conclusion that to hold otherwise would be to disregard the plain language of §5 (11) conferring *exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law.*"

The Circuit Court refused to recognize the import of 49 USC §5 (11) which was invoked by the carriers when they filed their application under §5 (2) in Finance Docket 21155:

> The authority conferred by this section shall be exclusive and plenary . . . any carrier participating in a transaction . . . under the provisions of this section . . . shall be and they are relieved from the operation of the anti-trust laws and of all other restraints,

limitations and prohibitions of law, *Federal,* State or Municipal, in so far as it may be necessary to enable them to carry into effect . . . *terms and conditions . . . imposed by the Commission.*"

The Circuit Court in this case, therefore, has ruled contrary to the clear mandate of Congress, i.e., when acting on an application under §5 (2), the restraints of all other laws are suspended to effectuate the purpose of the statute.

In *Kent v. Civil Aeronautics Board,* 204 F. 2d 263, the *Second Circuit* ruled as the Eighth Circuit did in *Brotherhood of Loc. Eng. v. Chicago,* supra, though that suit involved a merger of airlines. The court held the Civil Aeronautics Board had power to determine seniority rights of flight engineers of the merging airlines. The court held the contracts relative to seniority had to yield to the paramount power of the Board to perform its public duties under the Statute.

New Orleans & North. RR v. Bozeman, 312 F. 2d (1962) (*Fifth Circuit*), involved a merger under 49 USC §5 (11). A dispute arose over dismissal of workers and the carrier took the position that under the Railway Labor Act it could not be compelled to arbitrate the dispute. The Court held that since the carrier accepted the "conditions for the protection of labor" it had to submit the dispute to compulsory arbitration, as provided in the ICC Order.

Thus we have the *Second, Fifth and Eighth Circuits* in agreement that under a Congressional statutory scheme allowing mergers, all other agreements and statutes are

suspended to effectuate the approving Order of the Statutory Agency.

The Third Circuit stands alone. Despite the clear meaning of the Congressional Act, despite the rulings of This Court and three sister Circuits, The Third Circuit Court of Appeals by dismissing this Complaint on a Motion under FRCP 12 (b), relegates the plaintiffs to a tribunal established under the Railway Labor Act, which Act is clearly suspended by virtue of 49 USC §5 (11).

III. Res Judicata

It is of no moment that the Third Circuit used the ruse of Res Judicata to dismiss this Complaint on Motion. For before it, was a Complaint grounded on 49 USC §5 (11), calling for an interpretation of that section as well as §5 (2) (f) which calls for the "protection of workers" affected by the merger requested under §5 (2) and §5 (11). This Statute was not before the court in *Roberts*, supra. So that even if the court in *Roberts* correctly ruled that the Railroad Adjustment Board had primary jurisdiction over the interpretation of the retirement agreements and the Washington Job Protection Agreements placed in issue in *that* case, that ruling had no relevance to the Complaint before the court in the instant case.

The plain import of the instant complaint is that the carriers violated §5 (2) (f) of 49 USC when they entered into forcible retirement agreements *after* the ICC Order approving the abandonment; the relief sought by the plaintiffs was simply that imposed by the ICC in its approving

Order: That the dispute be resolved by compulsory arbitration. This the lower court granted, and the Third Circuit reversed.

The Third Circuit totally ignored the limited functions of the National Railroad Adjustment Board. Its jurisdiction is restricted to the interpretation of collective bargaining agreements. *Elgin v. Burley,* 325 U.S. 711 (1951). Plaintiffs in this Complaint do not ask for an interpretation of any agreement; nor do they present a minor grievance under *Elgin v. Burley,* supra.

Plaintiffs charge the carriers with violating §5 (2) (f) and ask this Court to follow the mandate of §5 (11) which suspends all federal law, and order compulsory arbitration, which was the sole method of resolving labor disputes imposed upon the defendant railroads by the ICC Order.

Even if all the above were not so, the Third Circuit erred, in ruling that *Roberts* barred this action, for fundamental reasons. The *Roberts* Complaint was dismissed, not after a trial, but under FRCP 12(b), on the grounds that the court had no jurisdiction over the subject matter. The effect of that judgment, therefore, that the National Railroad Adjustment Board had primary jurisdiction over this dispute, is not substantive, for it was not on the merits. Any obiter dicta found in the District Court's decision 211 F. Supp. 379 or in the decision of the Third Circuit, affirming it 323 F. 2d 219 cannot be a substantive finding and therefore cannot be binding on another cause of action, because the only issue before the courts in *Roberts* was whether or not the court had *jurisdiction* over the subject matter.

Yet in the instant case the Third Circuit held that the *Roberts* rulings (obiter dicta) on the various agreements pleaded, were substantive findings and binding on the plaintiffs; hence, since the *Roberts* court ruled the agreements were valid, their interpretation had to go to the National Railroad Adjustment Board; and The Third Circuit said, this Complaint must be dismissed because of what the *Roberts* court said. But in *Murray v. Pocatello,* 226 U.S. 318, 57 L. Ed. 239, Justice Holmes held at 323:

> ". . . if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were . . . and when jurisdiction to grant equitable relief was denied, the ground of the merits could not be reached."

As recently as *Costello v. U.S.,* 365 U.S. 265, 5 L. Ed. 2d 551, 81 S. Ct. 534 (1961)*, This Court held:

> "If the first suit was dismissed for defect of pleading, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." (p. 285)

In 49 ALR 2d 1066, the author wrote:

> "Consequently, even though a court, in rendering a judgment for the defendant on the ground of lack of jurisdiction, determined a question material to the merits, but not material to the determination of the

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* Precisely the view taken by the Restatement on Judgments; see Section 49, Comment A. See *Desrosiers v. Am. Cyanamid,* 377 F. 864 (2d Cir.), 1967.

court's jurisdiction, such determination of a question material to the merits is not conclusive in a subsequent action between the same parties." (Citing *Murray v. Pocatello,* supra.)

Despite the clear language of the decisions of This Court, the Third Circuit failed to realize that Roberts was not decided on the merits, but on a Motion under FRCP 12 (b) filed by the defendants who contended the court had no jurisdiction over the subject matter, and held at p. 26 (infra):

"We have examined the earlier case, *Roberts v. Lehigh & New Eng. Ry* (citations omitted). There is no significant difference between the parties in that suit and the parties here. The plaintiffs complained of exactly the same wrong, their involuntary retirement without severance pay pursuant to the contract between the railroad and the brotherhoods. However, in the *Roberts* case they sought a different remedy, namely, a declaratory judgment that their enforced retirement was invalid and an award of punitive damages measured by the severance pay they would have received but for the allegedly illegal contract. It is also contended now that the two cases are significantly different because in the first case the contract imposing retirement was attacked as a violation of the Railway Labor Act while it is the theory of the present case that the contract contravened the 1961 Interstate Commerce Commission decision, and, therefore, violated the Interstate Commerce Act.

"However, we think these contentions unduly shorten the reach of res judicata. The *Roberts* case

decided that the contract between the railroad and the brotherhood was valid and binding upon the present plaintiffs. They cannot now obtain a reconsideration of that ruling even on a ground not heretofore urged."

In ruling thusly, The Third Circuit totally ignored Justice Brandies' sound reasoning in *Southern Pac. Co. v. Bogert,* 250 U.S. 483, 63 L. Ed. 1099 (1919), where the Court said at page 490:

> "Because of wide divergence the earlier decrees do not operate as res judicata. And there is no basis for the claim of estoppel by election; nor any reason why the minority who failed in the attempt to recover on *one theory,* because unsupported by the facts, should not be permitted *to recover on another* for which the facts afford ample basis."

The Third Circuit refuses to identify the problem for what it is: a pleading problem, and takes the view contrary to that enunciated by This Court in *Conley v. Gibson,* 355 U.S. 49, 2 L. Ed. 2d 87 (1955), where it was said:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." (p. 86)

Petitioners request This Court to afford them the only relief to which they are entitled under the ICC Order of September 26, 1961: compulsory arbitration of their dispute; and in so doing, placing the Third Circuit in line with This Court and the Second, Fifth and Eighth Circuits which have already ruled on the meaning of 49 USC §5 (11).

CONCLUSION

For all of the above reasons, petitioners believe this Petition for a Writ of Certiorari should be granted.

Lawrence J. Richette,
Attorney for Petitioners.

APPENDIX A

United States Court of Appeals
For the Third Circuit

No. 16514

Ira Clemens (Individually and on Behalf of Others Adversely Affected)

v.

Central Railroad Company of New Jersey, Lehigh and New England Railway Company and Lehigh and New England Railroad Company,

Appellants

Appeal From the United States District Court for the Eastern District of Pennsylvania

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Argued February 6, 1968

Before: Hastie, Chief Judge, and Freedman and Van Dusen, Circuit Judges.

Appendix A

OPINION OF THE COURT

(Filed August 9, 1968)

By Hastie, Chief Judge.

As originally filed, the complaint in this suit by involuntarily retired employees of a railroad sought "an injunction, mandatory in nature" to compel the railroad "to abide by the Order and Certificate of the Interstate Commerce Commission providing for severance pay in accord with the New Orleans case." Subsequently, an amendment to the complaint supplemented the prayer for relief by asking "in the alternative" that the court issue a mandatory injunction requiring the parties to arbitrate their dispute.

The complaint alleges that since January, 1962, the plaintiff and other employees, constituting a class, have been illegally subjected by the railroad to forced retirement at age 65 without severance pay[1] pursuant to a wrongful and invalid collective bargaining contract between the railroad and the railroad brotherhoods, purporting to act as representatives of the employees.[2] The contract is said to be invalid because it undertakes to deprive

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[1] This controversy concerns severance pay only, not pensions or any other normal retirement benefits to which employees may be entitled.

[2] Throughout this case the assumption of the parties and the court has been that the 1962 labor contract is properly interpreted as denying severance pay to retiring workers. It was held in *Roberts v. Lehigh & New England Ry.*, 3d Cir. 1963, 323 F. 2d 219, that any dispute as to the correctness of this interpretation is within the exclusive jurisdiction of the Railway Retirement Board. Similarly, in this case we do not rule upon the correctness of the interpretation.

the plaintiffs of benefits guaranteed to them by a decision of the Interstate Commerce Commission, Finance Docket No. 21155, Sept. 26, 1961, authorizing the railroad to abandon certain trackage subject to the conditions of the so-called New Orleans Union Passenger Terminal case which incorporated certain provisions of the Washington Job Protection Agreement providing severance pay for employees who should lose their jobs as a result of a permitted abandonment of railroad facilities. As stated above, the complaint asks that the railroad be ordered to make severance payments or to arbitrate the dispute.

A defense motion for summary judgment on the basis of res judicata was denied and the court ultimately ordered the parties to submit their dispute to arbitration. In reaching this result, the court decided that the contract between the railroad and the brotherhoods was invalid insofar as it abrogated any rights to severance pay derived from the employee protective provisions of the 1961 decision of the Interstate Commerce Commission.

On appeal one of the railroad's contentions is that this court and the district court have held in an earlier lawsuit between the same employees and the railroad that the involuntary retirement provisions of the contract between the railroad and the brotherhoods are binding on the plaintiffs and, therefore, that this issue cannot properly be reexamined or the earlier ruling reversed in this action.

We have examined the earlier case, *Roberts v. Lehigh & New England Ry.*, 3d Cir. 1963, 323 F. 2d 219, *affirming*, E.D. Pa. 1962, 211 F. Supp. 379. There is no significant difference between the parties in that suit and the parties

here. The plaintiffs complained of exactly the same wrong, their involuntary retirement without severance pay pursuant to the contract between the railroad and the brotherhoods. However, in the *Roberts* case they sought a different remedy, namely, a declaratory judgment that their enforced retirement was invalid and an award of punitive damages measured by the severance pay they would have received but for the allegedly illegal contract. It is also contended now that the two cases are significantly different because in the first case the contract imposing retirement was attacked as a violation of the Railway Labor Act while it is the theory of the present case that the contract contravened the 1961 Interstate Commerce Commission decision and, therefore, violated the Interstate Commerce Act.[3]

However, we think these contentions unduly shorten the reach of res judicata. The *Roberts* case decided that the contract between the railroad and the brotherhood was valid and binding upon the present plaintiffs. They cannot now obtain a reconsideration of that ruling even on a ground not heretofore urged. When the *Roberts* case was here on appeal, point III of the plaintiffs' brief was entitled: "The Issue is the Illegality of the January 1962 Agreements, not the Meaning of those Agreements and the 'Washington Job Protection Agreement.'" Under this heading they argued that but for the bar of the January 1962 contract they would assert their rights under the

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[3] Section 5(2)(f) of the Interstate Commerce Act provides that in approving any such transaction as was sanctioned by its 1961 decision the Interstate Commerce Commission "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." 49 U.S.C. §5(2)(f).

Washington Agreement in an appropriate administrative proceeding. Addressing itself to that issue this court concluded that rights given by the Washington Job Protection Agreement, as allegedly extended to the plaintiffs by the 1961 decision of the Interstate Commerce Commission, could be changed by a contract entered into by an authorized collective bargaining agent acting in good faith and without "hostile discrimination" against any of those it represented, and that no bad faith or hostile discrimination had been established.

Now in a second case the plaintiffs are again seeking a decision that the 1962 contract cannot abrogate severance rights created by the Washington Job Protection Agreement as incorporated in the 1961 Interstate Commerce Commission decision. This is the same controversy that was before us in the *Roberts* case.[4] The only allegedly new matter is the citation of a provision of the Interstate Commerce Act requiring that appropriate economic protection be afforded displaced workers, rather than the guarantees of the Railway Labor Act, as the statutory basis of the claim, common and essential to both suits, that the 1962 contract could not lawfully deprive workers

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[4] The court below found that "the decision in *Roberts* was based on the Court's lack of jurisdiction under the Railway Labor Act, and its finding . . . that primary jurisdiction lay elsewhere. That decision was not on the merits." Consequently the district court held that the doctrine of res judicata should not apply in this case. This approach overlooks the fact that in *Roberts* we passed on the merits of the issue of the legality of the 1962 contract, which was before us for substantive determination, before reaching the question whether any additional question about the "interpretation" of the contract should be left to administrative decision.

of the benefits given them by the 1961 decision of the Commission. We hold that this difference is insufficient to avoid the bar of res judicata.

In *Williamson v. Columbia Gas & Elecrtic Corp.*, 3d Cir. 1960, 186 F. 2d 464, one of the issues before this court was whether res judicata applied when successive civil antitrust suits sought damages for the same acts, alleged in the first suit to violate the Sherman Act and in the second to violate the Clayton Act. In holding that a decision denying the first claim barred the second, this court ruled "that the fact that different statutes are relied on does not render the claims different 'causes of action' for purposes of res judicata." 186 F. 2d at 468. True, as the court below pointed out in the present case, there was also in the Williamson case a separate consideration that both suits were barred by the same statute of limitations. But we considered and ruled upon the different statutory bases of the suits quite apart from and independently of the statute of limitations question. In these circumstances, we view our above quoted *Williamson* ruling as authoritative and applicable here. We add that the *Williamson* ruling was predicated upon authoritative Supreme Court decisions. *E.g., Grubb v. Public Utilities Comm'n.*, 1930, 281 U.S. 470. See also *United States v. Moser*, 1924, 266 U.S. 236; *Independent Petroleum Workers v American Oil Co.*, 7th Cir. 1963, 324 F. 3d 903.

Finally, the plaintiffs' effort to escape the bar of res judicata is not aided by pointing out that in the first case they sought reinstatement and punitive damages in the amount of the severance pay, while now they are accepting their discharge as final and are seeking arbitration. In any event, the ultimate relief which the plaintiffs are now

seeking through arbitration is severance pay and the equivalent was requested in the first case.

The judgment will be reversed and the cause remanded for the entry of summary judgment for the defendants on the ground of res judicata.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

ORDER AMENDING OPINION

The opinion of the court filed herein on August 9, 1968, is hereby amended by substituting for the name "Railway Retirement Board," as it appears in footnote 2 of said opinion, the name of "Railroad Adjustment Board."

William H. Hastie,
Chief Judge.

Date: September 20, 1968

APPENDIX B

ORDER

And Now, this 30th day of December, 1966, the motions of the defendants, Central Railroad of New Jersey, et al., for summary judgment or in the alternative to dismiss for failure to state a claim for which relief can be granted, are denied. The plaintiff's petition for arbitration of this dispute is granted.

The question for arbitration is whether the plaintiffs' relationship with the defendants was severed as a result of a consolidation or merger of facilities. See *Washington Job Protection Agreement.* (Reprinted in Hearings held by the House Committee on Interstate and Foreign Commerce on H.R. 2531, 76th Congress, 1st Session, 231-241 (1939).) Should they so find, the arbitrators are directed to determine the persons entitled to benefits and the amount of compensation due them.

In accordance with an opinion which will be filed, the parties must, within ninety (90) days after receipt of said opinion:

(1) Arrive at the composition of the arbitration panel, in accordance with the opinion.

(2) File with this Court any suggestions which they might have as to payment of any costs related to the arbitration, including the cost of the "independent arbitrator."

Appendix B

This Court retains jurisdiction over all aspects of this case necessary to implement this order compelling arbitration, including the granting of additional relief.

By the Court:
A. Leon Higginbotham, Jr.,
J.

OPINION

(264 F. Supp. 551)

The above action was brought by Ira Clemens on his behalf, and for others similarly situated, against the defendant railroads. The plaintiffs seek an order from this Court to compel the defendants to submit their dispute to arbitration. The defendants have filed motions to dismiss or in the alternative for summary judgment.

The plaintiffs contend that this dispute must be arbitrated in accordance with the Washington Job Protection Agreement of May, 1936, and its modifications as found in the *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271 (January 16, 1952). Defendants argue that the complaint should be dismissed on the ground that it fails to state a claim for which relief can be granted. Specifically, the defendants argue (1) this action is barred by the doctrine of res judicata; (2) this Court lacks jurisdiction over the subject matter of the litigation; (3) the plaintiffs have failed to plead a proper class action; (4) this action should be stayed until the costs in a previous action are paid; and (5) the plaintiffs have waived any right of arbitration which they might have had by bring-

ing this suit. *It is my conclusion that the parties must be required to submit this dispute to arbitration.*

In April of 1960, the defendant, Lehigh and New England Railway acquired control of the Lehigh and New England Railroad. The Railway obtained the approval of the Interstate Commerce Commission for the abandonment of approximately 77 per cent of the trackage of its acquisition. Approval of this request was granted by the Commission in 1961. *Interstate Commerce Commission Finance Docket No.* 21155. The Commission imposed, and the defendants accepted, certain conditions for the protection of the Railroad as part of its order authorizing the acquisition and abandonment. Essentially, the conditions imposed for the protection of adversely affected workers were derived from the Washington Job Protection Agreement of May, 1936. Briefly, that agreement called for the payment of compensation to railroad workers who have been displaced because of carrier mergers or consolidations.

In seeking permission the Railway informed the Commission that such abandonment would entail severing the employment of approximately one hundred and ten men. Railway, in early 1960, approached the three local lodges[1] with the proposal of revising their collective bargaining agreement so that when an employee reached age sixty-five he would be required to retire without severance pay. This proposal was rejected. Thereafter, in November of 1961, the Railway severed the employment relationship of

[1] The three unions involved were Lodge 713, Brotherhood of Locomotive Firemen & Enginemen; Lodge 734, Brotherhood of Railroad Trainmen; Lodge 619, Order of Railway Conductors & Brakemen.

thirty men who were at that time over sixty-six years of age and paid them severance pay in accordance with the Washington Job Protection Agreement.

In January of 1962, each of the three unions, after approval of their membership, entered into an agreement with Railway which provided for compulsory retirement of all workers when they reached the age of sixty-five. These agreements were ratified by the majority of the members of each of the unions involved. As a consequence of this agreement the plaintiff Clemens, and others, who had been employees of the Railway, were retired at the age of sixty-five *without severance pay.* Some of these adversely affected workers then brought suit against the Railway Company and the unions. See *Roberts v. Lehigh and New England Railway Company,* 211 F. Supp. 379 (E.D. Pa. 1962), affirmed 323 F. 2d 219 (3 Cir. 1963).

In *Roberts,* the plaintiffs' complaint was dismissed by Chief Judge Clary, and this dismissal was affirmed by the Court of Appeals. The complaint was dismissed on the ground that the dispute was one over which the National Railroad Adjustment Board had primary jurisdiction, and that the Courts were without jurisdiction to decide the matter. In Chief Judge Clary's judgment the subject of the dispute revolved around the interpretation of the various agreements and not their validity. The Court of Appeals affirmed.

Subsequent to the dismissal of the complaint in *Roberts,* two new complaints were filed, and it is the second of these complaints that the defendants now seek to have dismissed. The unions who were joined as defendants in *Roberts* are not now before this Court. In addition Lehigh and New England Railway Company and its parent,

the Central Railroad Company of New Jersey, who were not joined in *Roberts* have now been joined as defendants.

I.

The defendants argue that the plaintiffs are barred from prosecuting this complaint by reason of the doctrine of res judicata. Specifically, they contend that the decision in *Roberts, supra,* resolved, as against the plaintiffs, all the issues presented by the complaint in the instant case. The essential distinction between this case and *Roberts* is that here the plaintiffs seek to have this Court order the defendants to arbitrate the dispute in accordance with an order of the Interstate Commerce Commission.

At the threshold, we are faced with the question of whether this Court can order arbitration in view of the *Roberts* case. If we are to determine the validity of the defendants' contentions it must first be made clear what was actually decided in that case. When the *Roberts* case was decided in this Court by Chief Judge Clary, the decision turned on the assumption that the only statute applicable to the cause was the Railway Labor Act, 45 U.S.C. 151 et seq. See 211 F. Supp. 379, 381-82. Chief Judge Clary held that the contentions raised by the plaintiffs constituted a "dispute between employees and carriers as to interpretation of (a) collective bargaining agreement" within the Railway Labor Act. 211 F. Supp. 379, at p. 381. The resolution of this dispute, Chief Judge Clary held, was within the exclusive primary jurisdiction of the National Railroad Adjustment Board. The Court of Appeals upheld Chief Judge Clary's decision dismissing the plaintiffs' complaint for failure to state a claim for which

relief can be granted. Thus it would appear that no decision on the merits was rendered. The defendants, however, point to certain language of the Court of Appeals' opinion which they claim precludes this action.

In the earlier suit the plaintiffs had attacked the retirement agreements because they discriminated against the older workers in favor of the younger ones. In response to this argument the Court made the following observations:

> However, the allegations in the complaint do not set forth any facts from which hostile discrimination on the part of defendants would be a permissible inference. There is no assertion that the provision was agreed upon by the Railway for the purpose of weakening one lodge in preference to another, or that it was accepted by the three lodges by reason of fraud or coercion or in "bad faith or ill will." Each lodge consented to the inclusion of the provision in the agreement only after a majority of its members voted in favor of it. The fact that the provision may favor younger workers who outnumber older ones with greater seniority rights is not a basis for a claim of hostile discrimination. See Ford Motor Co. v. Huffman, 345 U. S. 330, 338, 73 S. Ct. 681, 97 L. Ed. 1048 (1953) and Steele v. Louisville & N.R. Co., 323 U. S. 192, 203, 65 S. Ct. 226, 89 L. Ed. 173 (1944). (323 F. 2d 219 (1963) at p. 223.)

In addition, *Roberts* correctly pointed out that a bargaining representative, within the limits of its constitution, may agree to a change in the terms of a collective bargaining agreement provided such change does not violate the Railway Labor Act. It appears to me that the argu-

ments and opinions in *Roberts* proceeded on the assumption that the terms of the Washington Job Protection Agreement were merely terms privately agreed upon by the unions and railroads. A careful study of the complaint, answers, and the briefs filed in *Roberts* reveals that at no time did the plaintiffs assert that the provisions of the *Washington Job Protection Agreement* represented not merely a private collective bargaining agreement between the parties, but conditions imposed by the Interstate Commerce Commission for the protection of workers affected by a consolidation—as it is empowered to do by 49 U.S.C. §5 (2) (f).

Thus, considering the facts which were then before it, the following language of the Court of Appeals is perfectly understandable:

> The second reason given by plaintiffs is that the memorandum agreements circumvented certain provisions of the Washington Job Protection Agreement. This claimed reason is, of course, based on plaintiffs' interpretation of the agreements in question. *Even if we assume that they are right in their interpretation, the Act does not make the memorandum agreements invalid for that reason. The bargaining representative, within the limits of its constitution and by-laws, may agree to a change in the terms of a collective bargaining agreement provided such change does not violate the Act.* McMulhans v. Kansas, Oklahoma and Gulf Ry., supra, 229 F. 2d at p. 56 (at. p. 223, emphasis added.)

It is clear, therefore, that the *Roberts* case proceeded on two assumptions: (1) That the agreements involved were all private agreements—which was not the case; and (2)

that the applicable statute was the Railway Labor Act—which also was not entirely the case. Assuming, as did the plaintiffs in *Roberts,* that the Railway Labor Act was applicable, the Court of Appeals appropriately found that the agreements did not violate that act.

The plaintiffs now argue that the applicable statute is section five of the Interstate Commerce Act—and I agree. The question now becomes whether they are estopped from raising this issue by the doctrine of res judicata.

The defendants rely on two cases which in their judgment preclude the plaintiffs from seeking arbitration. They are *Bruszewski v. United States,* 181 F. 2d 419 (3 Cir. 1950) and *Williamson v. Columbia Gas and Electric Corp.,* 186 F. 2d 464 (3 Cir. 1950). The plaintiffs argue that in this suit, unlike *Roberts,* the unions are not parties, and that the parent railroad and one of its subsidiaries have been joined as parties, therefore any res judicata problems have been obviated. I agree with the plaintiffs that this action is not barred, but not because some of the defendants were not joined in the first action.

Bruszewski establishes the doctrine that where a binding final judgment has been entered against a party he cannot relitigate the matter by bringing the same action against another defendant where the claim depends on the same acts or omissions. In the instant case not only are the alleged acts or omissions identical but the joined parties are clearly in privity with the defendants in *Roberts* and would be able to have the benefit of the judgment in that case. Therefore, if the judgment in *Roberts* is not binding here, it is not because the parties are different, but for the reason that the issues are different and, in the

absence of a previous judgment on the merits, they can be raised here.

The defendants, however, argue that *Williamson v. Columbia Gas & Electric Corp., supra,* is binding here. In that case, the plaintiff brought two actions for damages alleging violations of the anti-trust statutes. In one suit he alleged that certain acts of the defendant violated the provisions of the Sherman Act. In the second suit he alleged that the same acts violated provisions of the Clayton Act. The complaint based on the Clayton Act was dismissed with prejudice because the action was barred by the statute of limitations. The defendant claimed that the judgment of dismissal in that case had res judicata effect on the Sherman Act complaint. The plaintiff asserted that res judicata did not apply because the two suits were different "causes of action" The Court upheld the defendants' contention that res judicata applied:

> Another difference claimed by the plaintiff in the two actions is that one suit is said to rest on the Sherman Act and the other on the Clayton Act. This argument carries no weight. While the rule may not have been clear at one time, we think it is now clear that the fact that different statutes are relied on does not render the claims different "causes of action" for purposes of res judicata (at p. 468).

The defendants argue that the instant case presents a situation very similar to the one in *Williamson, supra,* and thus the same result should follow.

Williamson must be understood in light of its facts. As noted earlier the plaintiff in that case brought two actions, one under the Sherman Act, and the second under

the Clayton Act. For reasons which are unclear, the Clayton Act complaint, in point of time, was decided first. In the suit under the Clayton Act, the defendant moved to dismiss the complaint on the ground the plaintiff had failed to state a claim for which relief could be granted. Both parties stipulated that any right of action possessed by the plaintiff accrued not later than January 1, 1931. The motion to dismiss was granted by the trial court. See 27 F. Supp. 198 (D. Delaware, 1939). The Court of Appeals affirmed. *Williamson v. Columbia Gas and Electric Corporation,* 110 F. 2d 15 (3 Cir. 1939).

The defendant contended that the action was barred by the statute of limitations because the suit was brought beyond three years of the accrual of the cause of action. The plaintiff, on the other hand, argued that an anti-trust action was analagous to the common-law action of "debt on a specialty," and that the applicable limitations period was twenty years. The action, therefore, would not be barred until January 1, 1951.

Highly relevant to an understanding of the case is the fact of the absence of a limitation period in both the Clayton and Sherman Acts at that time. The district court rightly held that since the anti-trust statutes did not contain their own limitation period Delaware's statute of limitations was applicable. The Court was then faced with the problem of determining which time period was the correct one:

> In order to apply a statute of limitations, such as that of Delaware, which reads in terms of common law actions, to a civil action brought in a district court, it is necessary for the court through a consideration of the nature of the cause of action disclosed

in the complaint to determine the form of action which would have been brought upon it at common law. *It is evident that the complaint in the case before us discloses a cause of action which, under the common law of Delaware, would be enforceable in an action on the case and not in an action of debt on a specialty. The district court, therefore, properly held that the action was barred by the Delaware statute of limitations.* (110 F. 2d 15, at p. 20; emphasis added.)

Having found that an anti-trust action sounded in tort under the relevant laws of Delaware it follows that when confronted with another complaint containing essentially the same allegations and demanding the same type of relief, the Court would apply the doctrine of res judicata. The correctness of this interpretation can be established by reference to the last *Williamson* opinion where the Court of Appeals observed that:

> The best way to find out what is involved in the two actions is to look at the claims made by the plaintiff. Neither case went to trial on the facts so all we have is what the plaintiff charges, plus the supplementary affidavits, motions, and the like, which led up to the action of the Trial Judge dismissing plaintiff's action No. 1. *The plaintiff alleges its organization and entry into the gas business. It says that the defendant, seeking to crush out a competitor, acquired the controlling shareholder interest in the plaintiff company and proceeded to manipulate its affairs to the disadvantage of the plaintiff and the advantage of the defendant. It says that after the plaintiff went into receivership the defendant named*

> *and controlled the receiver and the final result was that the plaintiff was forced into bankruptcy.* This is a general statement; no attempt has been made to particularize individual charges. (186 F. 2d 464, at p. 467; emphasis added.)

It must be recognized that the Clayton Act forbids acquisitions which tend to "lessen competition" or "tend to create a monopoly" whereas the Sherman Act proscribes existing monopolies. It should also be recognized that the dismissal of an action by reason of its being barred by the statute of limitations is an adjudication upon the merits. See *Angel v. Bullington,* 330 U. S. 183, 67 S. Ct. 657 (1947). Therefore, having found that the Clayton Act action was barred—thus ruling that the defendant's actions did not "tend to lessen competition"—the Sherman Act complaint charging actual monopolization was necessarily barred. *Williamson,* therefore, turned on a peculiar synthesis of the Delaware statute of limitations, common law forms of pleading, and a certain substantive overlapping of the federal anti-trust statutes.[2]

A review of *Williamson* establishes the following. *First, and foremost, the dismissal of the action was won on the merits. Second, the right violated and the legal wrong, in each case, were the same.* The right could be

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[2] It should also be noted that the Sherman Act complaint charged a continuing conspiracy, which might ordinarily have alleviated the limitations problem, as to acts alleged to have occurred after January 1, 1931; however, since the gravamen of the plaintiff's complaint was dismissed on the merits, the plaintiff could not then avail itself of the "continuing conspiracy" theory. In short, a decision on the merits was an adjudication that these acts failed to establish a violation of the anti-trust laws.

described as the plaintiff's privilege to conduct its business free from illegal economic restraints. The wrong was the invasion of that right by acts which unlawfully restrained that right. Every action of the defendant alleged in the Sherman Act suit had its origin in the alleged unlawful acquisition of stock which was raised in the Clayton Act proceedings.

In the instant case the statutes involved do not overlap, nor, in fact, are they similar. In addition, they do not proscribe the same actions. The *Roberts* case correctly held that an involuntary retirement agreement does not violate the Railway Labor Act. *However, the question of whether an otherwise valid retirement agreement could be applied to a group of employees entitled to protection under a provision of the Interstate Commerce Act could not be determined by an interpretation of the Railway Labor Act.*

It might very well be the case that given the doctrine of the *Williamson* case, if the Court in *Roberts* had decided that the plaintiffs had no right to severance pay, under any circumstances, they (plaintiffs) would have been precluded from further action. That is to say, if the Court in *Roberts* had decided the case on the merits, res judicata would apply even if the wrong statute had been construed. The defendants could then have argued that the plaintiffs having had the opportunity to raise the Interstate Commerce Act point and having failed to do so, were barred from challenging the *Roberts* decision. Fortunately, for the plaintiffs the Court of Appeals left the matter open.

The Court of Appeals decided, *on the basis of the facts before it,* that the interpretation of the agreements

lay in the exclusive jurisdiction of the Railroad Adjustment Board. Even more crucial was the Court's statement that if the plaintiffs abandoned their desire for reinstatement and accepted their discharge as final, they could bring a civil action for damages. See *Moore v. Illinois Central Railroad Co.*, 312 U. S. 630, 61 S. Ct. 754 (1941).

> . . . *They* [*the plaintiffs*] *do not concede that the Railway had the right to retire them even though it paid them the proper amount of severance compensation.* They argue that other employees with less seniority than they should have been furloughed instead. They do not ask for severance pay as such but are attempting to recover by way of punitive damages an amount equal to the total of the sums which would be paid them if they were considered as being deprived of their employment under the Washington Job Protection Agreement (at p. 224; emphasis added.)

We must bear in mind the fact that in *Roberts* the plaintiffs sought reinstatement, whereas in the present action they do not. At the very least the Roberts opinion suggests that they were not entitled to that mode of relief. *It did not, however, close the door to the plaintiff's prayer for some kind of relief.* The plaintiffs were given the option of accepting their discharge as final and then seeking severance pay—which is precisely the relief now sought by them. Therefore, plaintiffs should not be precluded from bringing this action by the doctrine of res judicata.[3]

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[3] The defendants have brought to the attention of the Court, that in Republic Steel Corporation v. Maddox, 379 U.S. 650, 85 S. Ct. 614 (1965), the Supreme Court appeared to invite the overruling of the rule of Moore v. Illinois Central R. Co., supra.

Appendix B

The decision in *Roberts* was based on the Court's lack of jurisdiction under the Railway Labor Act, and its finding—most proper under the circumstances—that primary jurisdiction lay elsewhere. That decision was not on the merits. Therefore, this Court is not precluded from finding that a different statutory scheme—one calling for arbitration—is applicable. Accordingly, the plaintiffs are correct in advancing this alternative avenue of relief. The

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They point out also that in Walker v. Southern Railway Co., 354 F. 2d 950 (4 Cir. 1965), the Court of Appeals for the Fourth Circuit, relying on Maddox, ruled that even where a worker accepts his discharge as final and seeks damages he must first exhaust his administrative remedies.

Subsequent to the filing of briefs in the instant action, the Supreme Court heard, and decided, the Walker case. See Walker v. Southern Railway Co.

S. Ct. (December 5, 1966). The Court declined to overrule Moore—at least in that case. It pointed to the difficulties experienced by workers in securing relief under the Railway Labor Act, and took note of Public Law 89-456, 80 Stat. 208-210 which drastically revised the grievance procedures under the Railway Labor Act. It observed that since Walker's case had arisen before the passage of P.L. 89-456, the new procedures were not available to him. Finally, it noted the contrast between the administrative remedy available in Maddox, *supra*, and that in Walker.

The Walker opinion gives some indication that in a proper case the rule of Moore might well be overruled. In any case, the trend towards requiring exhaustion of administrative remedies as exemplified in Maddox, and scarcely restrained by the Walker Case, would hardly be reversed by the result here. This Court does not undertake to decide the ultimate question of plaintiffs' right to severance pay, but only that the dispute is arbitrable. *It is true that the plaintiffs have brought suit, however, they seek merely an order to compel recourse to an administrative forum. Therefore, the decision to order arbitration here is perfectly in keeping with a policy favoring the utilization of administrative procedures—at least in the first instance.*

doctrine of res judicata should not apply, where, as here, the litigation has not yet reached a state of repose.

II.

Alternatively, the defendants argue that the complaint must be dismissed because the statutes on which the plaintiffs rely do not confer upon this Court jurisdiction over the subject matter. Insofar as the plaintiffs rely on 49 U.S.C. §5 (8) the defendants are correct. That section states that the "district courts of the United States shall have jurisdiction *upon complaint of the Commission,* alleging a violation of any order issued by the Commission thereunder . . ." It appears that it was contemplated that only actions brought by the Commission itself would be entertained under this section. Therefore, to the extent that the plaintiffs rely on this section this Court has no jurisdiction to grant them relief.

The plaintiffs rely also on 28 U.S.C. §1336 which they contend provides an alternate ground of jurisdiction. This section provides that the district courts "shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission." The defendants argue that *Arnold v. Louisville & Nashville R.R.,* 180 F. Supp. 429 (M.D. Tenn., 1960), aff'd sub nom. *Batts v. Louisville & Nashville R.R.,* 316 F. 2d 22 (5 Cir. 1963) supports their contention that this section also does not confer jurisdiction. This argument must be rejected.

In *Arnold,* the plaintiffs, formerly employees of a merged railroad, brought suit to recover compensation under the provisions of the *Washington Job Protection*

Agreement as imposed by the Interstate Commerce Commission. The Court held that the action could not be sustained under 28 U.S.C. §1336. Specifically, the Court held that the plaintiffs' rights were founded not upon the I.C.C. order but upon a subsequent agreement entered into by the unions and carrier *supplementing* that order. The agreement in *Arnold* was significantly different from that in the instant action, because it did not undertake to abrogate any benefits imposed by the Commission for the protection of adversely affected employees, but, on the contrary, sought to supplement them.[4] As was noted in Arnold:

> Thus, while the statute requires the Commission to make provisions for the protection of employees adversely affected, it specifically reserves to the railroad employees the right, through their duly authorized representatives, to enter into an agreement with the railroad as to terms, conditions and arrangements for their own protection. Under this provision of the statute, as the Court construes its meaning and effect, the employees may, through a collective bargaining agreement with the railroad make *provisions for their own protection by adopting, supplementing or implementing the provisions made by the Commission for their protection.* It would appear logically to follow that such an agreement takes the place of the order of the Commission *insofar as the agreement and the order relate to the same subject matter* (at pp. 433-34; emphasis added).

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[4] As we shall see the term "supplement" will have crucial significance in section five when we deal with this Court's power to order arbitration in this case.

The agreement in the instant action cannot be said to be one designed to adopt, implement or supplement the protective order imposed by the I.C.C. This is so because the agreement here abrogates the benefits imposed by the Interstate Commerce Commission. Thus, if the plaintiffs are entitled to any benefits they must rely on the order of the Commission itself. The agreement in *Arnold* merely elaborated the mode of protection imposed by the Commission; the agreement here would obliterate that protection.

The language of 28 U.S.C. §1336 explicitly gives the district courts jurisdiction to enforce orders of the Interstate Commerce Commission. See *Railway Labor Executives' Ass'n. v. United States, et al.*, 339 U. S. 142, 70 S. Ct. 530 (1950). Where, as here, the rights of the plaintiffs, if any, are founded on such an order, this Court has jurisdiction to entertain the action. It should also be noted that the Court in *Arnold* ruled as it did particularly because it felt that the plaintiffs should arbitrate the dispute as provided in the Commission's order. *Here, the plaintiffs also seek to have arbitration of their dispute with the defendants.* *Arnold* must be read in the context of its particular facts, and, when so read, does not bind us here.

III.

The defendants urge the Court to dismiss this action insofar as it is represented to be a class action. They argue that (a) the plaintiffs have not demonstrated that they can represent the class adequately, (b) the nature of the class is not clearly defined, and (c) there is no indication of the size of the class.

In support of these contentions they rely primarily on *D & A Motors v. General Motors,* 19 F.R.D. 365 (S.C. N.Y. 1956). The defendants contend that the allegations stated in plaintiff's complaint are similar to those made in the above case in which a class action was dismissed because it did not conform to the requirements of Rule 23 of the Federal Rules of Civil Procedure.

The *D & A Motors* case was a class action brought by some automobile dealers seeking treble damages, under the anti-trust laws, against the defendants. The Court dismissed the class action because the claims of the alleged class members were so numerous and varied as to make it impractical to try them together. The Court held also that it was unclear whether:

> the class referred to is confined to former dealers driven out of business, is comprised of all would-be dealers allegedly denied access to the industry, or also includes independent dealers still doing business in the face of the monopolistic practices alleged (at p. 366).

In the instant case it appears to be quite clear what group of persons are represented. They are men discharged by the defendants who have either reached the age of sixty-five, and have been retired, or those shortly to reach that age. Indeed the class is further limited in that it includes only those men who worked for the railroad before the I.C.C. order was entered. Nor does it seem to this Court that the claims of the members of the purported class are so "numerous and varied" that they would make the class-suit device impractical. The claims of the members stem from the same factual situation and raise a common legal question. Assuming, arguendo, that the

plaintiffs have met the pleading requirements, then the legal question raised is common to all of them on the merits. Although the monetary sums to which the class members would be entitled might vary, because of different lengths of service, all recoveries would depend on whether the dispute was held to be arbitrable.

Although the plaintiff has not been exact in his allegations concerning the number of class members, he has been reasonably specific. The defendants have been put on notice that the class will not exceed the figure two hundred. In any event, the defendants are obviously aware of the number of men who have been involuntarily retired. The Federal Rules of Civil Procedure do not require the specificity in pleading that once was required. Admittedly, even under these liberal rules of pleading the defendants must understand the nature of the plaintiffs' claim; however, in my judgment this requirement has been met here.

IV.

The defendants contend that should the plaintiffs' complaint be upheld, this action should be stayed because the plaintiffs in *Roberts,* supra, of which group Ira Clemens was one, have not yet paid the costs assessed against them. To support this argument they cite *Gainey v. Brotherhood of Railway & S.S. Clerks, etc.,* 34 F.R.D. 8 (E.D. Pa. 1963).

Gainey was a class action in which the plaintiffs sought to recover back wages from the defendant railroad and damages from a bargaining agent. The plaintiffs' complaint was dismissed and they filed a second complaint alleging essentially the same facts. The defendants moved

to stay the second action until the costs assessed against the plaintiffs were paid. That motion was granted by the Court.

That decision was based on an interpretation of Rule 41 (d) of the Federal Rules of Civil Procedure with which I do not differ. However, a careful reading of Judge Freedman's opinion indicates that there is no absolute rule which requires a stay of one action because costs assessed in a related action have not been paid. Judge Freedman noted that:

> When all is said and done, each case must be decided on its individual circumstances. These include the relative situation of the parties, the history and content of the prior litigation in which the costs were incurred, and the current litigation before the court. *It is a situation which peculiarly calls for the exercise of judicial discretion* (at p. 11, emphasis added).

Clearly, the decision as to whether this action should be stayed rests within the sound discretion of this Court. Rule 41 (d) is permissive in nature and does not require an automatic stay. Therefore, we must determine whether the decision in *Gainey* can be distinguished from the instant case. It is the judgment of this Court that it can.

Gainey appears to rest on three grounds, (a) that the parties to both actions were the same, (b) that no showing of the inability of the plaintiffs to pay was made, and (c) that the likelihood of the plaintiffs' success in the second suit was small. It is undoubtedly true that the plaintiffs are the same as in *Roberts.* It is also true that the plaintiffs are seeking compensation, whether it is sought in damages as in *Roberts,* or compulsory arbitration as is

now sought. Essentially, the plaintiffs feel that they have a right to remuneration whatever form the proceedings take. Nor can it be denied that, even if it is true that Clemens is the only plaintiff who is of record in both proceedings, the relief which is sought will benefit all of the workers. Thus, if the identity of the plaintiffs in both suits was the only factor, the defendants' request for a stay should be granted. However, there are other factors which must be considered.

In *Gainey,* the Court was not impressed with the plaintiffs' contention of inability to pay court costs. I must decide whether the same contention advanced here has any merit. It should be noted that the class in *Gainey* was at least three times as large as that here, and that its members were, at the time of the action, gainfully employed. The class in *Gainey* numbered 600 and the assessed costs were $1,501.85. This sum amounted to approximately $2.50 per plaintiff. Although the sum assessed in *Roberts* is not great we must take into consideration the fact that the plaintiffs in this litigation have been retired and are living on pensions which total at most $135.00 a month. It can safely be said that they are in far less comfortable circumstances than the plaintiffs in *Gainey.* The staying of this action till costs are paid may effectively reduce their chances of receiving compensation —if they are entitled to it.

This Court is not prepared to say that the dismissal of the *Roberts'* complaint indicates that there is no chance of the plaintiffs' success in this action. The plaintiffs have raised interesting questions which are worthy of a full hearing.

Finally, the defendants seek to convince the Court that the plaintiffs have been initiating "oppressive and vexatious litigation"—a tactic which Rule 41 is designed to prevent. I am by no means convinced that this is the motive of the plaintiffs. Rather, it appears that the plaintiffs believe that they have a justified grievance and are seeking to plead a complaint which will be legally sufficient. The discretion granted to the Courts under Rule 41 (d) to stay this action will not be exercised in this case.

V.

The defendants argue that this Court cannot order this dispute arbitrated. Alternatively, they contend that even if the dispute is arbitrable the plaintiffs waived their right to arbitration by electing to bring suit. For purposes of clarity, I will deal first with defendants' alternative argument.

The defendants rely on a series of cases to establish the proprosition that by bringing suit the plaintiffs have waived their right to have the dispute arbitrated. See *Galion Iron Works & Mfg. Co. v. J. D. Adams Mfg. Co.*, 128 F. 2d 411 (7 Cir. 1942); *Cavac Compania v. Board for Val. of German Bonds,* 189 F. Supp. 205 (S.D. N.Y. 1960); *American Locomotive Co. v. Gyro Process Co.,* 185 F. 2d 316 (6 Cir. 1950); *The Belize,* 25 F. Supp. 663 (S.D. N.Y. 1938). Each of these cases were brought under the Federal Arbitration Act, 9 U.S.C. §4 and do not support the principle contended for by the defendants. It is true that the cases above do state the principle that a right to arbitration can be waived by the institution of suit; however, in those cases the courts made it clear that the plaintiffs had to elect between their remedies. In short,

either they sought arbitration or by filing suit have the dispute resolved by the courts. In none of these cases was the plaintiff placed in the position in which the plaintiffs here would find themselves if the defendants' arguments were adopted. In the line of cases relied on by the defendants, the plaintiffs were able to have their complaints resolved by the courts even if they could no longer have them arbitrated. Here the plaintiffs would be unable to go to arbitration and this Court would be unable to resolve the dispute. This is so because by bringing this action the plaintiffs do not seek to have an adjudication of their underlying claim, but only an order compelling arbitration. Therefore, the cases relied on by the defendants are inapposite.

The second issue—this Court's power to compel arbitration—is more difficult to resolve. Both the defendants and the Interstate Commerce Commission argue that this Court is without power to order arbitration. Specifically, they argue (1) that the retirement agreements are valid, (2) that they were authorized by 49 U.S.C. §5 (2) (f), (3) that the issue sought to be arbitrated is beyond the scope of the arbitration provisions of *Washington Job Protection Agreement*, and (4) that the *Washington Job Protection Agreement* provides that where one is deprived of employment because of age its provisions are inoperative.

The defendants first argue that the retirement agreements were held to be valid by the Court of Appeals in *Roberts* and also that their validity is confirmed by the rationale of *Humphrey v. Moore*, 375 U. S. 335, 84 S. Ct. 363 (1964). I agree that these cases confirm the validity of these agreements under the Railway Labor Act. The issue, however, is not their validity, but whether they

can be applied to the plaintiffs. That is to say, whether an otherwise valid provision can be applied to workers who were "affected" as a result of a coordination of facilities, if the provision post-dated the I.C.C. protective conditions. It is the judgment of this Court that under those circumstances such a provision could not be so applied.

The conditions imposed by the Interstate Commerce Commission were based on a provision of the Interstate Commerce Act which empowers the Commission to provide protection for employees adversely affected by mergers and consolidations.[5]

I requested the Interstate Commerce Commission to file an amicus curiae brief and participate in oral argu-

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[5] 49 U.S.C. §5(2)(f) provides:

As a condition of its approval, under this paragraph of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Nothwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

ment. At the argument the Interstate Commerce Commission took the position that the memorandum retirement agreements fall within the ambit of the "notwithstanding" clause of §5 (2) (f) under which the authorized representatives of the employees may enter into an agreement with the carrier providing for the protection of affected employees. The plaintiffs, on the other hand, vigorously deny that the retirement agreements constitute "protection of their interests." Thus, we must determine the meaning of the "nothwithstanding" proviso.

The proper meaning of this clause, we believe, was provided in *Arnold v. Louisville & Nashville R.R., supra.* There the Court decided that any supplementary agreement between the authorized representative and the carriers must be *adoptive, supplementive or implementive,* and that any agreement must deal with the same subject matter as the I.C.C. order. The plain meaning of those words would suggest that an agreement which denied all benefits to the employees was neither adoptive, supplementive or implementive.[6] In *Arnold,* the Court approved

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[6] In an affidavit sworn to by J. A. Craddock, Vice President of the defendant, Central Railroad of New Jersey, the following facts were admitted:

Employees retiring at or after age 65 immediately prior to the effective date of the memorandum agreements, i.e., July 1, 1962, received retirement benefits under the Railway Retirement Act of 1937, as amended, 45 U.S.C.A. Sections 228(a) to 228 (y), inclusive.

Employees retiring on or after July 1, 1962, received no benefits over and above those received by employees retiring theretofore by reason of the memorandum agreements and no separate understandings or agreements providing for supplemental financial benefits or other specific benefits to persons who had attained the age 65 and who would attain the age of 65 before July 1, 1962, were made.

at least by implication, an agreement, negotiated under the "nothwithstanding" proviso, which provided for a lump sum payment instead of protection ordered by the Interstate Commerce Commission. A lump sum payment instead of benefits extending over a four year period can be justified as "adoptive" of the I.C.C. order because it provides the employee with a sum which may reflect the present value of payments extended over a four year period of time. It may enable the employee to take action with regard to his financial future which he might not be otherwise able to take. Clearly, the instant case does not meet the test of *Arnold* unless, of course, the phrase "protection" has some other meaning.

The defendants make the further argument that when §5 (2) (f) speaks of protecting the interests of "employees affected" it refers to the whole class of employees and not merely to those whose jobs are lost and/or whose relationship with the carrier is severed. Implicitly, it argues that all employees were affected by the consolidation in the sense that any of them could have been displaced. Thus, the crucial stage would be the potentiality of displacement and not actual displacement. Viewed in this light the retirement agreements would reflect a policy judgment concerning the best interests of the entire group, favoring the younger workers over the older ones. This is a plausible view of the provision's meaning, however, the legislative history of §5 (2) (f) leads me to the conclusion that this interpretation does not conform to the intention of Congress or the practice of the Interstate Commerce Commission.

Prior to the Transportation Act of 1940, there was no statutory provision specifically requiring the protection

of employees affected by consolidations of railroad facilities. In 1933, Congress passed the Emergency Railroad Transportation Act. One of the provisions of that Act authorized the Interstate Commerce Commission to give its approval to consolidations "upon terms and conditions . . . found to be just and reasonable." 48 Stat. 217. The Act expired in 1936. By this time, it had become widely apparent to much of the industry that the economics to be gained from consolidations or abandonments would be realized mainly at the expense of displaced labor. In 1936, the *Washington Job Protection Agreement* was signed in response to this problem.[7] This was a collective bargaining contract approved by approximately eighty-five percent of the railroad carriers and twenty of the twenty-one railroad brotherhoods. It contained a schedule of benefits recommended for employees adversely affected by consolidations or coordinations.

In 1938, President Roosevelt appointed a "Committee of Six" to consider the question of transportation, including railroad consolidations, and to recommend legislation.[8] This committee was composed equally of representatives of railroad management and labor. They endorsed the *Washington Job Protection Agreement* and recommended amending §5 of the Interstate Commerce Act to include the following language:

> After the details of any proposed consolidation have been determined by the interests involved, they

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[7] This agreement is published in the Hearings held by the House Committee on Interstate and Foreign Commerce on H.R. 2531, 76th Cong., 1st Sess. 231-241 (1939).

[8] Hearings before the Senate Committee on Interstate Commerce on S. 1310, 2016, 1869 and 2009. 76th Cong., 1st Sess. 3-5 (1939).

should be embodied in an application for approval, addressed to the Transportation Board. In passing upon such an application, the Board should be governed by the following considerations: . . .

. . . (d) The interests of the employees affected. The Board shall examine into the probable results of the proposed consolidation and require, as a prerequisite to its approval, *a fair and equitable arrangement to protect the interests of the said employees.*[9]

On March 30, 1939, Senator Wheeler and Senator Truman introduced S. 2009 which contained essentially the same language. The chairman of the Committee of Six was Carl R. Gray, Vice-Chairman of the Board of Directors, Union Pacific Railroad. The following colloquy is excerpted from Mr. Gray's testimony before the House Committee on Interstate and Foreign Commerce on the Committee's recommendations. It is relevant here because it sheds light on the meaning of the words "employees affected."

Mr. Martin: Mr. Chairman.

The Chairman: Mr. Martin.

Mr. Martin: *Mr. Gray, is your committee considering measures for the protection of employees who would be displaced by consolidations and mergers?* (Emphasis added.)

Mr. Gray: We do not have any disagreement about that, Mr. Martin. We have a complete understanding with respect to it and throughout our report here we have provided that there should be protection for the employees displaced.

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[9] Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2531, 76th Cong., 1st Sess. p. 275 (1939).

Mr. Martin: Is it proposed to do that by submitting legislation for the consideration of the committee, or how?

Mr. Gray: My judgment is that in the consolidation feature that will be included in some form.[10]

The Chairman: Mr. Youngdahl.

Mr. Youngdahl: *Mr. Gray, in connection with the suggested consolidation program, do you believe that it will create a further unemployment problem in the railroad industry?*

Mr. Gray: It will have that effect and it ought to be done when it is done to a great extent possibly on rising stages of business, Mr. Youngdahl.

Mr. Youngdahl: In answer to one of Mr. Maples' questions you said 'something must be done for the men whether it is voluntary or involuntary.'

I presume you refer to whether the consolidations are voluntary are [sic] involuntary.

Have you any suggestions as to what might be done for the men under consolidations?

Mr. Gray: Yes. We have had no difficulties in handling that separability with the men.

Mr. Youngdahl: You refer to your ability to furnish jobs.

Mr. Gray: *We have a basis of compensation for men who are displaced and men who are disadvantaged by a consolidation or coordination.*[11] (Emphasis added.)

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[10] Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2531, 76th Cong., 1st Sess. p. 184 (1939).

[11] *Ibid.*, p. 193.

The testimony of Mr. Gray makes clear that when the Committee of Six recommended statutory language to "protect the interests of . . . employees" it clearly had in mind those workers who were actually displaced by the consolidation and not the entire class of the carrier's employees.

In the same session of Congress in which §5 (2) (f) was adopted, the concern over the possibility of widespread displacement of railroad employees as a result of consolidations of facilities was so great that the following amendment was introduced by Rep. Harrington of Iowa.

> (No) such transaction (consolidation) shall be approved by the Commission *if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employers.* (84 Congressional Record p. 9882; July, 1939.)

The debate on the Harrington Amendment is too lengthy to be included in the text but excerpts are included in footnote 12.[12] The Harrington Amendment clearly re-

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[12] The following are excerpts from the debate on Harrington Amendment. Congressional Record, Vol. 84 Pt. 9. 9882-9886.

Mr. Harrington:—Mr. Chairman, the purpose of my amendment is to safeguard railway labor. We have contended all along, and I again repeat, this bill is essentially in the interest of railroad carriers, the stronger railroad carriers, I should say, and contrary to the interest of weaker roads, the water carriers, the shippers, the public, and, I emphasize right here, *contrary to the interest of the railroad employees.* (Emphasis added.) I realize full well the splendid work of the able gentleman from Ohio (Mr. Crosser) in behalf of the railroad employees' legislation, but I do think he has failed to recognize the dangers inherent in

flects the fact that the question about which Congress was most concerned in this area was loss of employment and

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this bill. If you want to pave the way for ghost railroads and ghost railroad towns if you want the blue envelope or the pink slip going out to 200,000 railroad employees do not vote for my amendment.

Some of you may be confused by the fact that several of the railroad brotherhoods have endorsed this bill under the mistaken impression that it protects the interests of the employer and prevents disemployment when consolidations are authorized. My analysis convinces me that the bill simplifies the method of consolidation and does not protect the employee. (Emphasis added.)

Mr. Warren—Mr. Chairman, I rise in support of the amendment offered by the gentleman from Iowa. (Mr. Harrington).

On last Friday, in making the first speech in opposition to this bill, directing the attention of railroad employees to the subject, I said as follows: 'Mark my words, when I say to them as a friend . . . that not one railroad job will this bill create, although it will throw thousands and thousands of others who toil out of employment. Certainly they must realize these coordinations and consolidations and shakedowns will ultimately mean the loss of thousands and thousands of their own jobs.' . . . *Forever there is hanging over them the specter of unemployment.* Men in my own district with at least 20 years of seniority—and I am told that men in other sections with more seniority than that—are today walking the streets without work having to mortgage their homes, seeing no possible chance of returning to their former jobs.

The amendment offered by the gentleman from Iowa (Mr. Harrington) would protect them and would write into this law the protection that every railroad man in the country, regardless of what brotherhood he belongs to, desires. (Emphasis added.)

Mr. Lea:—(Speaking in opposition to the Amendment.) . . . This bill provides for voluntary consolidation. It is not compulsory. The economic conditions, we thought, did

methods of dealing with this problem. The Amendment prohibited the approval of consolidations where they would result in loss of employment—in short it proposed a job freeze. It was actually passed by the House but eliminated in Conference. It is important here because it demonstrates how far some members of Congress were prepared to go in order to protect workers against displacement.

Finally, we note the testimony of George M. Harrison, President of the Railway Labor Executives Association, who recommended the enactment of the *Washington Job Protection Agreement* into law. Mr. Harrison was clearly under the impression that displaced workers were "affected" within the meaning of the contemplated amendment to §5 of the Interstate Commerce Act, when he said:

> Any employee who is deprived of employment as a result of a co-ordination is entitled to receive 60 percent of his average monthly compensation for varying periods of time based upon length of service with the employer . . . (Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2531, 76th Cong., 1st Sess. p. 241 (1939).)

This Court notes that the Interstate Commerce Commission has acted for many years on this reading of the

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not justify compulsory consolidation but only consent of those concerned. The railroad unions have an agreement with most of the class I railroads by which they are cared for during a period of five years to cover unemployment due to a consolidation. *It is estimated that ordinarily those who are discharged on account of consolidations will be taken care of for 5 years either through a pension system that has been established by this agreement or because of the normal release of labor which will provide places for a part of those who would lose their positions.*

statute. In *Oklahoma Railway Company Trustees Abandonment Of Operation, etc.*, 257 I.C.C. 177 (1944), the Commission interpreted the phrase "employee affected" as relating to workers displaced. At page 193 of its opinion the Commission noted that:

> . . . Oklahoma is willing to make agreements for the protection of the interests of its *employees who are displaced or dismissed as a result of the transactions,* incorporating therein the substance of the conditions imposed by the Commission for the protection of employees. . .

For these reasons the defendants' arguments on the proper interpretation of §5 (2) (f) are rejected.

Another argument raised by the defendants is that the arbitration provisions of the *Washington Job Protection Agreement* are limited in scope to such matters as the determination of an employee's displacement allowance, earnings to be offset, or the period of payment of the allowance." They argue that the dispute here falls outside the scope of the arbitration provisions. I find that the defendants' views as to the scope of those provisions is unnecessarily restrictive. See *Arnold v. Louisville and Nashville R.R., supra; Batts. v. Louisville and Nashville Railroad Co.*, 316 F. 2d 22 (6 Cir. 1963); *New Orleans and Northeastern Railroad Co. v. Bozeman,* 312 F. 2d 264 (5 Cir. 1963); *Louisville and Nashville Railroad Co. v. Cantrell,* 215 F. Supp. 229 (M.D. Tenn., 1962); *Brotherhood of Locomotive Engineers v. Chicago and Northwestern Railroad Co.*, 202 F. Supp. 277, aff'd. 314 F. 2d 424 (8 Cir. 1963).

If the defendants' view is correct, then some other method would have to be devised to determine the con-

ditions under which employees would be entitled to receive allowances. The defendants have not suggested any other explanation to this Court as to how this would be accomplished. The cases cited above confirm that the arbitration provisions were intended to have wider scope. In *Brotherhood of Locomotive Engineers v. Chicago and Northwestern Railroad Co., supra,* the Court held that the arbitration provisions were intended to be utilized to determine the "procedures to be followed in adjusting seniority rights of employees affected by consolidation of railroad yards." In *Arnold* and *Batts, supra,* the issue for arbitration was, whether certain discharges were the result of a merger or were caused by "loss of business, general economic decline, and other reasons not related to the merger." In *Bozeman, supra,* the defendant contended that the employee terminations were due to an improvement in operations, yet, the Court found this question moot for arbitration. Once again the objections raised by the defendants must be rejected.

The defendants also argue that the *Washington Job Protection Agreement* provisions do not apply where an employee is deprived of this employment because of age. Thus, they argue that the retirement agreements preclude the application of those provisions here. Section 7 of the Job Protection Agreement on which the defendants rely reads in part as follows:

> (j) A coordinating allowance shall cease prior to the expiration of its prescribed period in the event of:
>
> 1. Failure without good cause to return to service in accordance with working agreement after being notified of position for which he is eligible and as provided in paragraphs (g) and (h).

2. Resignation.

3. Death.

4. Retirement on pension or on account of age or disability in accordance with the current rules and practices applicable to employees generally.

The crucial phrase is that which begins "in accordance with the current rules and practices applicable to employees generally." Clearly, the reference to "retirement . . . in accordance with current rules and practices" refers to those rules which are already in effect when the protective conditions are imposed. The protective conditions were imposed in 1961, however, the retirement agreements were not sanctioned by the unions until January of 1962. Obviously then the retirement agreements were not "current" and section 7 (j) (4) of the Agreement does not apply to the instant action.

After a careful study of the question I conclude that this Court has the power to order arbitration of this dispute. There have not been many reported cases in which the federal courts have ordered arbitration under the protective conditions as imposed by the I.C.C. *Bozeman, supra,* was such a case as was the *Brotherhood of Locomotive Engineers* case. The Court, in *Bozeman,* observed that:

> Turning now to the meaning of the original language touching on arbitration, we think the language could hardly be plainer that the Commission order intended to give either party affected by the acquisition the absolute right to refer any dispute of the nature here in issue to arbitration. It says, the dispute 'may be referred, by either party, to an arbitra-

tion committee for consideration and determination.' It would be meaningless for the order to provide that the appellees may refer the dispute to arbitration if such provision were to be construed as also meaning that such election could be defeated by the refusal of the appellant to acquiesce. *The language plainly means that either party may make an election, binding on the other, to refer this dispute to arbitration.* (At p. 268, emphasis added.)

It is significant that in the *Arnold* case, on which the defendants rely, the Court dismissed the complaint because, in its judgment, the plaintiffs' remedy was arbitration.

> The history of Interstate Commerce Commission orders is convincing evidence that compulsory arbitration was intended in this case. In scores of cases involving merges (sic) and consolidations, the Commission has followed the practice of prosecuting arbitration as a method of settling disputes between affected employers and carriers and, so far as the Court can determine, the Commission's authority to do so has never been questioned. This long continued administrative practice is indicative of congressional approval (at p. 436).

Arbitration will be ordered in this cause on the question of whether the plaintiffs were discharged as a consequence of the abandonment and consolidation of the defendants' facilities.

VI.

Having concluded that arbitration should be ordered in the instant action it will be necessary to determine the composition of the arbitration panel. Such a course is

necessary because at the time the I.C.C. imposed the protective conditions, which are in dispute here, no provisions were made for the composition of such a panel. Thus, although the defendants accepted the provisions of the *Washington Job Protection Agreement,* as amended (See *Oklahoma Railway Co. Trustees Abandonment,* 257 I.C.C. 177 (1944); and *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271 (1952)), and therefore consented to arbitration, the mechanics of the process are unresolved.

The plaintiffs argue that since the unions entered into an agreement hostile to them they (the unions) should have no representation on any panel convened to resolve the dispute. They contend that only the carriers and themselves are entitled to representation and that both parties should then select a neutral member. The resolution of this issue depends on the meaning of the following passage in the *Oklahoma* and *New Orleans* conditions:

> In the event that any dispute or controversy arises which . . . cannot be settled by the carriers and the employee, or his authorized representatives, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, *the formation of which committee, its duties, procedure, expenses, etc., shall be agreed upon by the carriers and the employee, or his duly authorized representatives.* (257 I.C.C. 177, 200; emphasis added.)

The plaintiffs contend that their right to be represented on the panel in their own right is confirmed by the words "shall be agreed upon by the carriers and the employee, or his duly authorized representatives." They maintain that when the employees' interests are antagonistic to

those of their "authorized representatives" the employees have a right to be represented, to the exclusion of their unions. This argument is not an implausible one, however, for the reasons which follow I must disagree with the plaintiffs.

In *Louisville and Nashville Railroad Co. v. Cantrell, supra,* the employees argued that it "would be unfair and an impairment of their rights to be required to submit their claims for protective benefits to an arbitration committee concerning which they were denied any right of choice in its formation"—which is precisely the position of the plaintiffs here. The Court, in *Cantrell,* admitted that it had no precedent to guide it in arriving at a decision, however, it found an analogy in the National Railroad Adjustment Board. It noted that in effect the various divisions of that body are actually "nothing more than arbitration boards" whose membership is comprised of representatives of the carriers and unions. The following passage from the *Cantrell* opinion is relevant here:

> Counsel for defendants has argued that it is inconceivable after Congress had authorized and required the Commission to provide "a fair and equitable arrangement" to protect the employees that the Commission could lawfully provide for arbitration before a committee about whose membership the employee had no voice. We submit that the Railway Labor Act is a forceful expression of what Congress regards to be fair and equitable concerning the selection of an arbitration board and the Supreme Court has not only upheld the exclusive jurisdiction of the Board but commented upon the wisdom of Congress in providing for such a Board. (215 F. Supp. 229, at p. 237.)

Both the *Cantrell* opinion and the I.C.C. in its brief submitted to this Court on the same question, pointed out that the words "duly authorized representative" are used not only in the *Oklahoma* and *New Orleans* conditions but also in §5 (2) (f) of the Interstate Commerce Act and that they should have the same meaning.

> There can be no reasonable doubt when the Interstate Commerce Commission referred to "duly authorized representative" in Condition 8 of the Oklahoma Conditions, that term, as referreed to by the Commission, has precisely the same meaning as Congress intended it to have when Congress referred to that term in Section 5 (a) (f), the very statute under which the Interstate Commerce Commission imposed the protective conditions. Surely, the Commission did not intend for the words "duly authorized representative" to be construed to mean an attorney or some other type of representative with whom such agreements must be made when the Supreme Court of the United States had previously held in the Virginian Railway case, supra (Virginian Railway Co. v. System Federation, No. 40,300 U. S. 515, 57 S. Ct. 592), that when an employee had a duly authorized representative as provided by the Railway Labor Act, the carrier had an affirmative duty to make agreements with that duly authorized representative only and was forbidden to enter into agreements with any other representative (at page 239).

We agree with the Court in *Cantrell* that the intention of the Commission was to provide for direct representation of the individual employee only where he had no authorized

representative. The issue was put most aptly in *Cantrell* when the Court said:

> The question in the present cases is not whether the individual employees shall have a voice in the settlement of their own claims, nor do the cases involve a destruction or impairment of vested or accrued rights. The crucial issue is as to the proper method to be followed in determining claims of individual employees by arbitration; in other words, the setting up of the arbitration machinery itself. As the Court views the matter, it was the intention of the Interstate Commerce Commission and the intention of Congress, as expressed in the Interstate Commerce Act, *that such arbitration machinery should be provided for by the carrier and by the unions certified to represent employees under the Railway Labor Act, or by the carrier and the individual employee himself, where such employee was not represented by such a collective bargaining agent.* (At p. 240; emphasis added.)

It is my judgment that the arbitration panel shall be composed of representatives of the unions and the railroads. The railroads as a class and the unions as a class shall be entitled to one representative each. The third member of the panel will be named by agreement of the two other representatives.

This Court recognizes that the arguments made by the plaintiffs as to why the unions should be excluded from the arbitration phase of this controversy are not totally lacking in merit. The resolution of this issue was not without difficulty. However, it considers itself bound by the apparent intent of Congress and the interpretation given to §5 (2) (f) by the Interstate Commerce Commis-

sion. It should be noted that although the unions were a party to the retirement agreements, the validity of those agreements will not be at issue before the arbitration panel. Rather, that panel must decide only if the plaintiffs' discharge came about as a result of a consolidation of the defendants' facilities. There has been no proof of malice or bias on the part of the unions toward the plaintiffs; and we cannot presume that they will fail to appoint an arbitrator who will give the plaintiffs a fair hearing.

It is of course open to the plaintiffs to return to this Court should they be denied due process before the arbitration panel—an occurrence which we do not anticipate. By this we do not intend to suggest that the decision of the arbitration panel will necessarily be open to attack on the merits. We state only that the parties are entitled to an unprejudiced tribunal which will afford them the fair and impartial hearing and decision that due process requires. If in the administrative proceedings there has been a denial of due process, there is a right to a judicial review of the administrative decision. *Hornsby v. Dobbard,* 291 F. 2d 483 (5 Cir. 1961); *Ellerd v. Southern Pacific Railroad Co.,* 241 F. 2d 541 (7 Cir. 1957); *Sigfred v. Pan American World Airways,* 230 F. 2d 13 (5 Cir. 1956), cert. denied 351 U. S. 925, 73 S. Ct. 782 (1956).

The motions of the defendants for summary judgment or in the alternative a dismissal for failure to state a claim for which relief may be granted are denied. The request of the plaintiffs for an order compelling arbitration is granted.

This opinion is filed in accordance with my order of December 30, 1966, which noted, *inter alia:*

"In accordance with an opinion which will be filed, the parties must, within ninety (90) days after receipt of said opinion:

"(1) Arrive at the composition of the arbitration panel, in accordance with the opinion.

"(2) File with this Court any suggestions which they might have as to payment of any costs related to the arbitration, including the cost of the 'independent arbitrator.'

"This Court retains jurisdiction over all aspects of this case necessary to implement this order compelling arbitration, including the granting of additional relief."

By the Court:
A. Leon Higginbotham, Jr., *J.*

APPENDIX C

William C. Roberts and John Strunk, Appellants,

v.

Lehigh and New England Railway Company and Lodge 713, Brotherhood of Locomotive Firemen and Enginemen, Lodge 734, Brotherhood of Railroad Trainmen, Lodge 619, Order of Railway Conductors and Brakemen

No. 14303

United States Court of Appeals
Third Circuit

Argued April 23, 1963

Decided Oct. 2, 1963

Before Biggs, Chief Judge, and Hastie and Ganey, Circuit Judges.

Ganey, Circuit Judge.

This is an appeal from the allowance of motions to dismiss[1] the complaint in favor of the Lehigh and New England Railway Company ("Railway"), and three local lodges of railroad employee unions. Plaintiffs-appel-

[1] The opinion of the District Court may be found at 211 F. Supp. 379 (E.D. Pa. 1962).

lants are former employees of the Railway and former members of one of the three local lodges.

The two plaintiffs were involuntarily retired on June 30, 1962, pursuant to the terms of three memorandum agreements entered into by the Railway and the three local lodges in January of 1962. They sued on behalf of themselves and others similarly affected by defendants' actions. From the complaint and its supporting papers filed on July 11, 1962, we obtained the following information: In May of 1936, all of the defendants entered into the Washington Job Protection Agreement. A pertinent provision of that agreement called for severance pay based on years of service if an employee of a railroad is deprived of his employment by reason of the abolishment of his position as a result of the "coordination" of railroad facilities. Prior to the filing of the complaint and for many years before, there existed a collective bargaining agreement between the Railway's predecessor and the three defendant local lodges concerning "rates of pay, rules and working conditions."[2] Grievance or claims by an employee against the Railway were to be processed by the local lodge of which he was a member.

In April of 1960, the Railway acquired a railroad company which operated 179 miles of track in the Eastern District of Pennsylvania. The Railway obtained the approval of the Interstate Commerce Commission to abandon 77 percent or 138 miles of the trackage. In seeking permission the Railway informed the Commission that such abandonment would entail severing the employment of approximately 110 men. The Railway, in the early

[2] No copy of this agreement was attached to the complaint.

spring of 1960, approached the three local lodges with the proposal of revising the collective bargaining agreement so that when an employee reached age 65 he would be required to retire without severance pay. By referendum ballot, a majority of the members of the local lodges rejected the proposal. Thereafter, in November of 1961, the Railway severed the employment relationship of 30 men who were at that time over 66 years of age and paid them severance compensation in accordance with the Washington Job Protection Agreement. Immediately thereafter, the three local lodges once more presented the Railway's proposal of involuntary retirement for all employees upon their reaching 65 years of age. By ballot a majority of the employees signified their approval of the proposal. In January of 1962, each of the three local lodges entered into a memorandum agreement with the Railway. All three of the agreements contained the following provisions: The parties have agreed that all employees coming within the scope of the agreement "who have attained the age of 65, or who shall attain that age before July 1, 1962, shall be retired and their names removed from the seniority roster on June 30, 1962.

"Employees who shall attain the age of sixty-five after June 30, 1962, shall be required to retire and their names will be removed from the seniority roster.

"Neither this agreement, nor any provision contained herein, shall be used as a basis for time or money claims against the Carrier. Disputes involved in the application of this agreement shall be disposed of by the officer of the Railway designated to handle such disputes and the General Chairman.

"This agreement * * * shall cancel and supersede all previous agreements in conflict therewith * * *"

On June 30, 1962, the plaintiffs and ten other employees of the Railway, who were also members in good standing of one of the three local lodges, were involuntarily retired from their employment, without being paid severance compensation, and their names were removed from the seniority rosters of the Railway. Up until the time they were retired, plaintiffs held seniority rights under the collective bargaining agreement. The twenty-second paragraph of the complaint avers as follows: "The defendant labor organizations have in fact refused to recognize the claims of the plaintiffs who have protested that the January * * * 1962 agreement is an illegal and void collective bargain; and since the execution of that agreement, have refused to process any claim or appeal internally within their labor organizations or against the defendant carrier. Thus the employees have complied with the respective constitutions of the labor organization defendants with respect to internal appeals." However, there is no allegation in the complaint that the plaintiffs or the other ten men have attempt to present their claims to the appropriate division of the National Railroad Adjustment Board.

By way of relief the plaintiff sought (1) A declaration that the January 1962 memorandum agreements are void, (2) Reinstatement of all employees discharged under the agreements to the seniority rosters of the Railway, (3) Payment of lost wages resulting from the discharge, and (4) Punitive damages equal to the severance pay which would have been paid each of the discharged employees had the Washington Job Protection Agreement not been

nullified by the defendants. The prayer for relief does not ask that the three local lodges be compelled to present the complaints of the people involved to the appropriate division of the National Railroad Adjustment Board.

(1,2) Plaintiffs contend that the January 1962 agreements are invalid and unenforceable for three reasons. The first is that an involuntary retirement provision in a collective bargaining agreement is contrary to The Railway Labor Act, 45 U.S.C.A. §§151 et seq. A Federal district court has jurisdiction to determine the validity of a contract under the guarantees of the Act. On the other hand, if the resolution of the differences between railroad employees, on one side, and the railroad and the unions, on the other, depends on the interpretation of disputed terms of the collective bargaining agreement, then the dispute must be sent to the National Railroad Adjustment Board, which has exclusive primary jurisdiction to make the interpretation. Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed 795 (1950); Gainey v. Brotherhood of Railway, etc., Clerks, 275 F. 2d 342 (CA 3, 1960); cert. denied, 363 U. S. 811, 80 S. Ct. 1248, 4 L. Ed. 2d 1153; Haley v. Childers, 314 F. 2d 610 (CA 8, 1963). Getting back to plaintiffs' first reason, in the case of Terminal Railroad Association of St. Louis v. Brotherhood, etc., Trainmen, 318 U. S. 1, at page 6 of its opinion, 63 S. Ct. 420, at page 423, 87 L. Ed. 571 (1943), the Supreme Court said: "The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions." And on the same page, "Instead it seeks to provide a means by which agreement may be reached with respect to them." These words were quoted with approval in Brotherhood of Locomotive Engineers v. Baltimore & O. R. Co., 372 U. S. 284, 289-290, 83 S. Ct.

691, 9 L Ed. 2d 759 (1963). Hence on its face an involuntary retirement provision in a collective bargaining agreement does not violate the Act. See McMullans v. Kansas, Oklahoma & Gulf Ry., 229 F. 2d 50 (C.A. 10, 1956), cert. denied, 351 U. S. 918, 76 S. Ct. 710, 100 L. Ed. 1450; Goodin v. Clinchfield R. Co., 125 F. Supp. 441 (E.D. Tenn 1954), affd. 229 F. 2d 578 (C.A. 6, 1956), cert. denied 351 U. S. 953, 76 S. Ct. 850, 100 L. Ed. 1476 Yet a provision in a collective bargaining agreement which is valid on its face may be held invalid in its application because of hostile discrimination on the part of the railroad or the statutory collective bargaining representative. See Gainey v. Brotherhood of Railway & Steamship Clerks, 313 F. 2d 318 (C.A. 3, 1963). However, the allegations in the complaint do not set forth any facts from which hostile discrimination on the part of defendants would be a permissible inference. There is no assertion that the provision was agreed upon by the Railway for the purpose of weakening one lodge in preference to another, or that it was accepted by the three lodges by reason of fraud or coercion or in "bad faith and ill will." Each lodge consented to the inclusion of the provision in the agreement only after a majority of its members voted in favor of it. The fact that the provision may favor younger workers who outnumber older ones with greater seniority rights is not a basis for a claim of hostile discrimination. See Ford Motor Co. v. Huffman, 345 U. S. 330, 338, 73 S. Ct. 681, 97 L. Ed. 1048 (1953), and Steele v. Louisville & N. R. Co., 323 U.S. 192, 203, 65 S. Ct. 226, 89 L. Ed. 173 (1944)

(3, 4) The second reason given by plaintiffs is that the memorandum agreements circumvented certain pro-

visions of the Washington Job Protection Agreement. This claimed reason is, of course, based on plaintiffs' interpretation of the agreements in question. Even if we assume that they are right in their interpretation the Act does not make the memorandum agreements invalid for that reason. The bargaining representative, within the limits of its constitution and by-laws,[3] may agree to a change in the terms of a collective bargaining agreement provided such change does not violate the Act. McMullans v. Kansas, Oklahoma and Gulf Ry., supra, 229 F. 2d at p. 56.

(5, 6) The third reason given by the plaintiffs for contending that the 1962 memorandum agreements are invalid is that the provision stating: "Neither this agreement, nor any provision contained herein, shall be used as a basis for time or money claims against the Carrier." obliterated their rights to file claims with the local lodges or the Railway. Here again whether it does so is their interpretation of the 1962 agreements. The provision in question does not expressly prevent employees of the Railway from using the grievance procedure for objecting either to the inclusion of an involuntary retirement provision in the collective bargaining agreement or to their being retired under that provision. Whether it does by implication is not for the courts to decide. Furthermore, as the District Court pointed out, the main relief sought by the plaintiffs on behalf of themselves and others is reinstatement with back pay.[4] They have not chosen to ac-

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[3] Neither copies of the constitutions of the Unions of which the local lodges are members or the by-laws of the locals have been attached to the complaint.

[4] This was precisely the relief sought in Haley v. Childers, 314 F. 2d 610, 615 (C.A. 8, 1963).

cept the Railway's action in discharging them as final, thereby agreeing that they are no longer employees of the Railway.[5] They do not concede that the Railway had the right to retire them even though it paid them the proper amount of severance compensation. They argue that other employees with less seniority than they should have been furloughed instead. They do not ask for severance pay as such but are attempting to recover by way of punitive damages an amount equal to the total of the sums which would be paid them if they were considered as being deprived of their employment under the Washington Job Protection Agreement.

Accordingly, since the Complaint does not set forth a claim upon which relief can be granted by the District Court, the judgment of that court will be affirmed.

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[5] A discharged railroad employee may challenge the validity of his discharge before the National Railroad Adjustment Board and seek reinstatement and back-pay, or he may choose to accept the railroad's action in discharging him as final, and bring a civil action against the railroad for breach of contract. Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 244, 70 S. Ct. 577, 94 L. Ed. 795 (1950). Also see Moore v. Illinois Central R. Co., 312 U.S. 630, 634, 61 S. Ct. 754, 85 L. Ed. 1089 (1941).

APPENDIX D

William C. Roberts

and

John Strunk, Individually and on behalf of others adversely affected,

v.

Lehigh & New England Railway Company

and

Lodge 713, Brotherhood of Locomotive Firemen & Enginemen; Lodge 734, Brotherhood of Railroad Trainmen; Lodge 619, Order of Railway Conductors & Brakemen

Civ. A. No. 31715

United States District Court
E. D. Pennsylvania

Dec. 7, 1962

Clary, Chief Judge.

This case is before the Court on motions by all four defendants to dismiss plaintiffs' complaint.

Plaintiffs, who bring this action on behalf of themselves and others adversely affected, are former employees of defendant, Lehigh & New England Railway Company,

and its predecessor, Lehigh & New England Railroad Company, and former members of the three defendant Brotherhoods: Lodge 713, Brotherhood of Locomotive Firemen & Enginemen; Lodge 734, Brotherhood of Railroad Trainmen; and Lodge 619, Order of Railway Conductors & Brakemen.

Plaintiffs' complaint arises out of the termination of their employment and their removal from the seniority rosters of the Lehigh Railway on June 30, 1962 pursuant to collective bargaining agreements between the Railway and the Brotherhoods providing for mandatory retirement at age 65. Earlier, in April 1960, what was then the Lehigh *Railroad* merged with the defendant, Lehigh *Railway,* resulting in a decrease in the necessary work force. In January of 1962, the Brotherhood Locals and the Railway entered into the mandatory retirement agreements.

Plaintiffs allege that under a prior collective bargaining contract, the 1936 Washington Job Protection Agreement entered into by numerous unions and rail carriers, including the defendant Brotherhoods and the defendant Railway's predecessor, the Railway has a duty to grant severance pay to employees whose jobs are abolished as a result of that merger. It is asserted that the retirement agreements are a deliberate attempt by the Railway, joined in by the Brotherhoods, to avoid the necessity of these severance payments. It is further alleged that the retirement agreements amount to unauthorized alterations of the Washington Job Protection Agreement. Finally, plaintiffs charge that the manner in which the Brotherhoods entered the agreements, the grievance procedures under the agreements, and the provisions for compulsory retirement at age 65, amount to discrimination.

Appendix D

All defendants have moved to dismiss the complaint and have asserted in their briefs and arguments that the complaint fails to state a claim for which relief can be granted, that it does not properly allege a class action and that the Court lacks jurisdiction.

The crux of the jurisdictional objection is that Congress has granted to the National Railroad Adjustment Board all power over disputes growing out of grievances or out of the interpretation or application of collective bargaining agreements. In pertinent part, the Railway Labor Act provides:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."
> 45 U.S.C.A. §153 First (h) Fourth division (i).

(1) While the statute might appear to be phrased permissively, the Supreme Court, in Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950), has determined that this section grants the Board exclusive primary jurisdiction over disputes between employees and carriers as to the interpretation of collective bargaining agreements. The Court feels that this is just such a dispute.

Appendix D

Plaintiffs have asserted a myriad of charges of discrimination and illegal action against both the Brotherhoods and the Railway, the solutions of which, in all instances, require initial determination of the substantive meaning of the involved contracts. Plaintiffs lay claim to certain rights under the Washington Job Protection Agreement, and assert that the defendants, by entering into the retirement agreements, have discriminatorily denied these rights without justification. Thus, this claim depends essentially upon the meaning of the various agreements, and more important, the effect of each upon the others. This is precisely the style of interpretive functions with which the Board has been charged.

The instant case differs from Felter v. Southern Pacific Co., 359 U.S. 326, 79 S. Ct. 847, 3 L. Ed. 2d 854 (1959) in which the validity of a dues checkoff agreement was properly decided by a District Court and not by the Board. In that case, there was no question of interpretation but only one of validity. The Court stated at page 327, footnote 3, at page 850 of 79 S. Ct.:

> "Since there was no question of interpretation or application of the collective agreement, but rather only one of its validity under the statute, the case is not one in which resort to the grievance and Adjustment Board machinery provided by the Railway Labor Act was required. 'This dispute involves the validity of the contract, not its meaning.' Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 774, 72 S. Ct. 1022, 96 L. Ed. 1283."

At this point, however, it is necessary to recognize and confront the distinction between the claim against the Railway and that asserted against the Brotherhood Locals.

Appendix D

The before-quoted section of the Railway Labor Act speaks explicitly in granting jurisdiction in disputes between employees and carriers but is silent as to those between employees and their statutory representatives.

(2) This uncertain situation is further complicated by the line of cases allowing the Courts to hear discrimination claims asserted by railroad employees against their unions. E. G. Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 72 S. Ct. 1022, 96 L. Ed. 1283 (1952); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 65 S. Ct. 235, 89 L. Ed. 187 (1944); Steele v. Louisville & Nashville R. R. Co., 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173 (1944). The theory behind allowing such actions has been essentially this: The RLA imposes a duty upon the union to represent the minority as well as the majority. In performing this duty, the representative is not barred from making contracts which may have unfavorable effects on some members, but is barred from any discrimination of an irrelevant or invidious nature. Such discrimination is a violation of the union's statutory duty to represent and a violation of the employees' rights to be represented. Thus, the violation of a federal right is implied from the statute and its policy. The cases, therefore, arise under a law regulating commerce and are within the jurisdiction of the Federal Courts. Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, supra, 323 U.S. at 213, 65 S. Ct. 235.

While most of these cases have involved racial discrimination, over which the expertise of the Board does not necessarily extend, this possible distinction is not relied upon here. A search of these cases, however, reveals

none which turn so essentially upon the interpretations of collective bargaining agreements as does the case at bar. As detailed before, a decision as to possible discrimination by the Locals or the Railway cannot be reached until after the meaning and effect of these agreements are ascertained.

(3) The claims asserted here against the carrier and the Brotherhoods arise out of agreements collectively bargained under the authority and direction of the Railway Labor Act. It is axiomatic that a primary purpose of this and similar legislation is the promotion of a mutually advantageous labor-management climate, one of fairness, harmony and a necessary degree of predictability. Multiple interpretations of the same agreements, perhaps in direct opposition to each other, are certainly not directed toward these interests, but would rather defeat them. Pennsylvania Railroad Co. v. Day, 360 U.S. 548, 551-552, 79 S. Ct. 1322, 3 L. Ed. 2d 1422 (1959). As to all the defendants, the nature of the problem and the need for experience and expert knowledge remain the same. The same agreements must be interpreted in a uniform manner to reach an orderly adjustment of the differences.

(4) It is clear from the foregoing that the complaint has failed in its attempt to allege a cause of action cognizable in this Court. With respect to the defendant Brotherhoods, paragraphs 11, 12, 13, 14 and 15 of the complaint allege, in essence, that the carrier, in the spring of 1960, attempted to revise the then existing collective bargaining agreements with the Brotherhoods to provide for compulsory retirement at age 65 without severance pay. This proposal was rejected by vote of the Brotherhood Locals. In November of 1961, approximately 30 men were served with severance pay. Thereafter the

proposition was revived and by majority vote of the Locals, compulsory retirement was provided for at 65 without severance vote. The complaint alleges that younger members, by their affirmative votes, made the difference. There is no allegation in the complaint that there was any fraud, duress or coercion on the part of the carrier or the Brotherhoods in the negotiation and signing of this agreement, since it was done by a clear majority vote of the members of the organizations involved. The gravamen of the complaint is that the two named plaintiffs and other members to be retired in the future have been deprived of some rights which relate back to the Washington Job Protection Agreement. This immediately leads us back to the problem first discussed—the effect of negotiated railway labor agreements.

As before stated, any rights which plaintiffs may have would appear to arise out of the interpretation of the Washington Job Protection Agreement in conjunction with the presently effective negotiated bargaining agreements. Since Congress has proscribed the review of and interpretation of these agreements by the Courts, it is clear that the Court is without power to act in the premises, particularly since there is no attack on the fundamental validity of the agreements. Felter v. Southern Pacific Co., supra. The motions to dismiss will therefore be allowed.

APPENDIX E

United States Court of Appeals
For the Third Circuit

No. 16,514

Ira Clemens (individually and on behalf of others adversely affected)

v.

Central Railroad Company of New Jersey, Lehigh and New England Railway Company and Lehigh and New England Railroad Company,

Appellants

ORDER SUR PETITION FOR REHEARING

Present: Hastie, *Chief Judge;* and Kalodner, Freedman, Seitz, Van Dusen and Aldisert, *Circuit Judges*

The petition for rehearing filed by IRA CLEMENS (individually and on behalf of others adversely affected), appellees, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the

circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
(s) William H. Hastie,
Chief Judge.

Dated: October 4, 1968.

APPENDIX F

Interstate Commerce Act

49 §1 (18). *Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.*

". . . and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment . . ."

49 §1 (19). *Application for certificate of Commission; notice and hearing.*

". . . Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line railroad, or the operation thereof, is proposed to be abandoned . . ."

49 §1 (20). *Issuance of certificate by Commission; unlawful extension or abandonment of lines.*

"The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the

partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require . . ."

49 §5 (2) (a). *Unifications, mergers and acquisitions of control.*

"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; . . ."

49 §5 (2) (b).

"Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission . . ."

49 §5 (2) (f).

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the

period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

49 §5 (11). *Plenary nature of authority under section.*

"The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said

transaction without invoking any approval under State authority; and any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the anti-trust laws and of all other restraints, limitations and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain and operate any properties and exercise any control or franchises acquired through such transaction . . ."

APPENDIX G

Railway Labor Act

45 §153 ***National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards.***

First. "There is established a Board, to be known as the 'National Railroad Adjustment Board,' the members of which shall be selected within thirty days after June 21, 1934, and it is provided— . . ."

(h) ". . . First division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers and outside hostler helpers, conductors, trainmen and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees . . ."

Second. "Nothing in this section shall be construed to prevent any individual carrier, system or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section . . ." As amended June 20, 1966. Pub. L. 89—456, §§1, 2, 80 Stat. 208, 209.

SUPREME COURT, U. S.

DEC 11 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 728

IRA CLEMENS (Individually and on Behalf of Others Adversely Affected),

Petitioner

v.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, LEHIGH AND NEW ENGLAND RAILWAY COMPANY AND LEHIGH AND NEW ENGLAND RAILROAD COMPANY,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A to Petition, pp. 24-30) is reported at 399 F. 2d 825. The opinion of the District Court (Appendix B to Petition, pp. 31-73) is reported at 264 F. Supp. 551. The opinion of the Court of Appeals in the prior case *Roberts* v. *Lehigh and New England Ry.* (Appendix C to Petition, pp. 74-81) is reported at 323 F. 2d 219 and the District Court's opinion in the companion case *Roberts* v. *Lehigh and New England Ry.* (Appendix D to Petition, pp. 82-88) is reported at 211 F. Supp. 379.

COUNTER STATEMENT OF QUESTION PRESENTED

Are not the plaintiffs barred by *res judicata* as a result of a prior decision of the Court of Appeals against them which sustained agreements whose invalidity was and is essential to plaintiffs' recovery when the present case involves the same agreements and the same parties, claim and controversy, the only allegedly new matter being an asserted violation of the Interstate Commerce Act instead of the Railway Labor Act?

COUNTER STATEMENT OF STATUTES INVOLVED

No statute is involved. The judgment of the Court of Appeals rests entirely upon the doctrine of *res judicata.*[1]

COUNTER STATEMENT OF THE CASE

On September 26, 1961, the Interstate Commerce Commission approved the abandonment by the Lehigh and New England Railroad Company of its trackage except for some forty miles the acquisition of which portion by defendant Lehigh and New England Railway Company ("Railway") was concurrently approved. In approving the applications the ICC provided the so-called "New Orleans" conditions for the payment of severance pay to employees affected by the abandonment.

In 1962, the plaintiffs, former employees of Railway, filed their Complaint in the prior case of *Roberts* v. *Lehigh and New England Railway Company,* 211 F. Supp. 379 (E.D. Pa., 1962), *aff'd,* 323 F. 2d 219 (C.A. 3, 1963). In

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[1] Briefed and argued before the Court of Appeals by the Respondents but not reached by that Court, were the questions (1) whether, aside from the binding effect of the Court's prior decision, the retirement agreements were valid as a matter of law, particularly the Interstate Commerce Act, and (2) whether the District Court in its Opinion and Order requiring arbitration had predetermined substantive and procedural matters that should have been left to the arbitrator.

that case, the plaintiffs complained of mandatory retirement agreements entered into between the Railway and certain brotherhoods. It was alleged that the agreements were invalid and that the plaintiffs were wrongfully deprived of severance pay by reason of their retirements under the invalid agreements. The District Court upheld the validity of the retirement agreements and the Court of Appeals affirmed.

As observed by the Court of Appeals in the present case, "[t]here is no significant difference between the parties" in this case and the parties in the *Roberts* action, and the plaintiffs complain of exactly the same wrong, *i.e.*, their involuntary retirement without severance pay pursuant to the retirement agreements between Railway and the brotherhoods (Appendix A to Petition, at pages 26-27, 399 F. 2d 825, 826).

Only two differences between the first case and this case are noted by the Court of Appeals, neither one of which was found sufficient to lift the bar of *res judicata*. The remedy sought in the *Roberts* case was a declaratory judgment that the retirement agreements were invalid and an award of punitive damages measured by the severance pay the plaintiffs would have received but for the allegedly illegal agreements. The Court of Appeals pointed out that although an order requiring arbitration is the relief requested in the present case, the ultimate relief sought by plaintiffs in both cases was nevertheless severance pay. It was contended also by the plaintiffs that the present case was significantly different because in the *Roberts* case the retirement agreements were attacked as a violation of the Railroad Labor Act while in the present case they are attacked as a violation of the Interstate Commerce Act. The Court of Appeals, however, held that the controversy was the same and that any such difference between the two cases was insufficient to avoid *res judicata*. (Opinion of the Court of Appeals, Appendix A to Petition, at page 28, 399 F. 2d 825, 827).

ARGUMENT

Realizing that the decision of the Court of Appeals has no significant impact on any case other than the present one, the petitioners have made a valiant effort to bring before this Court questions involving the so-called "plenary power" of the ICC in relation to the Railway Labor Act. The decision of the Court of Appeals, however, involves no consideration of the Interstate Commerce Act, the Railway Labor Act, or any matters having to do with the Interstate Commerce Commission, its powers or its limitation.

The decision of the Court of Appeals rests entirely upon the principles of *res judicata* and is required by the decisions of the Courts of Appeals and the decisions of this Court on such matter. See Opinion of the Court of Appeals, Appendix A to Petition, at page 29, 399 F. 2d at 827-828.

Actually, it appears that petitioners' effort is to gain review not of the present case but of the earlier decision of the Court of Appeals in *Roberts* v. *Lehigh and New England Railway Company,* 323 F.2d 219 (C.A. 3, 1963). Petitioners complain that they are compelled to take their claims against the respondents to the National Railroad Adjustment Board. But that route was ordained to them by the *Roberts* decision in 1963 of which no review by this Court was sought. The present decision simply precludes the relitigation of the validity of the retirement agreements which are and were the central pivot of the petitioners' claims, leaving it to the petitioners to take the route suggested in the earlier case, *i.e.,* an appeal to the National Railroad Adjustment Board as to any disputed matters involving the interpretation of those agreements.

The petitioners seek to litigate in this Court questions long since litigated and put to rest against them in the earlier *Roberts* litigation. The decision of the Court of Appeals in the present litigation generates no broad ques-

tions of policy under the Interstate Commerce Act or conflicting decisions in respect thereof. The sole and narrow question is the impact of the doctrine of *res judicata* on the individual circumstances of this case.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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